87-1118

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ROSEMARY BELFIORE, d/b/a NUTMEG NEWS, MURRAY BERMAN, d/b/a BERMAN NEWS SERVICE and MURRAY'S NEWS SERVICE, BROOKWOOD SERVICES CORPORATION, GREENACRES COM NEWS LTD., GROVE NEWS SERVICE, INC., ZIGMUNT POPLASKI, d/b/a Z & J NEWS SERVICE, RICHARD RITTER, d/b/a GREENFIELD HILLS NEWS SERVICE, and ERIC SCOTT, d/b/a NEW CANAAN/SCOTTY'S NEWS SERVICE,

Petitioners,

THE NEW YORK TIMES COMPANY and MCI CORPORATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether a special master's acceptance of paid employment from one party's counsel during his tenure as special master without either counsel or the special master making disclosure of any kind requires his disqualification and vacatur of the judgment?

2. Whether a special master's failure to disclose on the record his 40 year economic relationship with one party's counsel, including employment by that party's counsel which continued through the date of the appointment, requires his disqualification and vacatur of the judgment?

3. Whether summary judgment was improperly granted in light of substantial evidence of antitrust violations by a monopolist publisher — including (a) its intentional destruction of a historic pro-competitive distribution system so as to render it unavailable to competitors and potential competitors, (b) its below cost competition in concert with wholesalers and telephone solicitors against its own distributors, and (c) price fixing — and despite the fact that discovery motions requesting economic and other data were left undecided by the District Court.

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Petitioners,

— v. —

THE NEW YORK TIMES COMPANY and MCI CORPORATION,

Respondents.[1]

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered on August 7, 1987.

[1] The counterclaim and third party complaint were dismissed on consent after summary judgment was granted on the complaint and therefore the following third-party defendants were not parties to the appeal below and are not parties to this petition: Harold Ball, Jr., d/b/a Ball News Service, Salvatore Belfiore, d/b/a Nutmeg News and James J. Hill, d/b/a Muke's News.

OPINIONS BELOW

The opinion of the Court of Appeals (App. 1-17) is reported at 826 F.2d 177. The opinion of the District Court (App. 19-36) is reported at 654 F.Supp. 842.

JURISDICTION

The judgment of the Court of Appeals was entered on August 7, 1987. The petition for rehearing was denied on September 30, 1987.

CONSTITUTIONAL PROVISIONS, STATUTES AND CODES INVOLVED

The following relevant provisions are reprinted in the appendix: The Fifth Amendment to the Constitution of the United States of America (App. 38); Title 28 of the United States Code, Section 455(a) and (e) (App. 38); The Code of Judicial Conduct for United States Judges, Cannons 3C(1), 3D and 5C(1) (App. 38-39); Rule 56 of the Federal Rules of Civil Procedure (App. 39); and Title 15 of the United States Code, Sections 1, 2, 15(a) and 26 (App. 39-40)

STATEMENT OF THE CASE

I. *Appointment of The Special Master*

In December 1982, the District Court recommended selection of a special master to supervise discovery and pretrial proceedings (JA113-16).[2] In January 1983, with the consent of all parties, the District Court appointed a special master, Kenneth Wallace (JA132). Mr. Wallace made no disclosure on the record of any relationship with any of the parties at the time of his appointment (JA1441-46, 1553-58). Mr. Wallace did inform plaintiffs' counsel, off the record, that following his graduation from law school he had been an associate of Cahill Gordon & Reindel ("Cahill Gordon"); Cahill Gordon is counsel for defendant The New York Times Company (the "company") (JA1438-53).

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[2] "JA" refers to the Joint Appendix in the Court of Appeals. Jurisdiction in the federal court pursuant to 28 U.S.C. §1337 was based upon plaintiffs' claims of violation of federal antitrust laws.

A. *The Special Master's Failure to Disclose*

In fact, Mr. Wallace had a nearly 40 year economic relationship with Cahill Gordon which was maintained for at least 8 months into his tenure as special master. This undisclosed association is summarized as follows:

> (1) He was an associate at Cahill Gordon for 14 years ending in 1960 where he worked with the company's lead counsel, Denis McInerney (JA1477, 1569-70);
>
> (2) After he left Cahill Gordon, Mr. Wallace served for 10 years as general counsel to a Cahill Gordon corporate client, Bigelow-Sanford, Inc. (JA1478-79, 1571-74);
>
> (3) After he left Bigelow-Sanford and returned to private practice, "a number" of cases were referred to Mr. Wallace by Cahill Gordon (JA1478-79, 1578-80);
>
> (4) On occasion, Cahill Gordon used Mr. Wallace as local counsel in suits pending in Connecticut; at the time of his appointment as special master, Mr. Wallace was serving as local counsel to Cahill Gordon on the "*M & R*" litigation; he continued as counsel in *M & R* for approximately four months after his appointment as special master (JA1478-79, 1482-83, 1574-77); Cahill Gordon and Mr. Wallace have refused to reveal how much compensation Mr. Wallace was paid for services rendered in the *M & R* matter — whether before or during the period he served as special master; and
>
> (5) Approximately eight months after his appointment as special master, Mr. Wallace was employed and paid by Cahill Gordon to perform legal services as local counsel in the "*Caspray*" case (JA1485, 1577).

Plaintiffs' 1984 motions for disclosure as to the relationship and for disqualification of Mr. Wallace based on the information known at the time were denied (JA1100-02, 1136-37, 1337-44, 1355-80). Plaintiffs' February 5, 1986 request that Cahill Gordon disclose what money Mr. Wallace was paid and what services he performed for Cahill Gordon while serving as special

master (JA1538-41) was refused as "inappropriate" (JA1542-43). Plaintiffs' request to the special master for a description of his 1985 and 1986 activities as special master was refused (JA1547, 1615-18). Plaintiffs' request to the District Court for disclosure and a factual hearing incident to their 1986 motion to disqualify the special master (JA1428) went unaddressed by the District Court when the motion was denied — not on the merits, but as "moot" in view of the District Court's grant of summary judgment to defendants (JA1632).

During the course of proceedings certain facts did come to light. In a January 22, 1986 hearing on Mr. Wallace's petition to be paid for outstanding bills, the District Court, in an ad hoc ruling, asked Mr. Wallace to take the stand to make disclosure requested by plaintiffs. He then disclosed for the first time that in private practice he had received referrals from Cahill Gordon (JA1477-84), but he failed to testify about his involvement in the *Caspray* matter. Mr. McInerney, a member of the Cahill Gordon firm, rose to refresh Mr. Wallace's recollection by disclosing for the first time that Cahill Gordon hired Mr. Wallace "shortly after he was appointed" as special master to work on another case later identified as *Caspray* (JA1485, 1577).

The fuller details known to date about the extended and continuing financial relationship between Mr. Wallace and Cahill Gordon were not disclosed to plaintiffs until Mr. Wallace served his papers in answer to plaintiffs' February 1986 motion to disqualify him (JA1561). Those papers contained the first disclosure to plaintiffs: (1) of the nature of Mr. Wallace's services performed in the *M & R* case during the several months after his appointment, including reviewing a decision regarding summary judgment, consultations regarding settlement negotiations and the preparation of a stipulation of discontinuance; (2) of Mr. Wallace being retained as local counsel by Cahill Gordon for at least two additional cases (Mr. Wallace had previously denied any recollection of having served as local counsel for Cahill Gordon while in private practice except in the *M & R* case) (JA1482, 1574); and (3) of the identity, nature of the services performed, fees paid, and the timing of Mr. Wallace's employment in the *Caspray* matter (8 months into his tenure as special master).

Mr. Wallace attempted to minimize his employment in *Caspray* by characterizing the work performed – obtaining a subpoena and subpoena duces tecum and arranging for service by the sheriff – as not constituting "legal services". Cahill Gordon paid him a fee of $500 plus disbursements for these services (JA1577). The relationship with Cahill Gordon was clearly so important to Mr. Wallace that, despite the small size of the assignment, he neither turned it down nor disclosed it to plaintiffs' counsel.

It is undisputed that (1) no disclosure of any kind as to Mr. Wallace's relationship with Cahill Gordon was made of record until submission of answering papers to the November 1984 disclosure motion (nearly 2 years after his appointment) (JA1485-86), and (2) no disclosure of any kind was made of the *Caspray* matter until January 22, 1986 (JA1485).

B. *The Substantive Participation of the Special Master*

Mr. Wallace required the parties to define "issues and contentions". Briefing of the issues and contentions took place before discovery was complete and before numerous motions concerning outstanding discovery had been ruled on by the special master or the District Court (JA837-40). With the product of this process, Mr. Wallace recommended findings of fact and conclusions of law to the District Court (JA387; App. 34 n.13). The District Court obviously read and relied upon Mr. Wallace's reports because its opinion includes two references to them (App. 22, 34 n.13).

Mr. Wallace had free *ex parte* access to the District Court and conducted *ex parte* telephone conversations with counsel for both parties (JA311, 1363, 1374-77, 1432-34, 1533-38, 1584-85). It is impossible to know what Mr. Wallace said in his various *ex parte* conferences with the District Court and counsel, or to determine what written materials he transmitted to the Court.

During the first two years of his tenure, Mr. Wallace held frequent personal and telephone conferences and wrote at least 44 reports of these conferences and rulings on motions in addition to a multitude of other correspondence (*e.g.*, JA137-422). The

special master's fees totalled approximately $256,000 for the period January 1983 through March 1986 (the month following argument of the summary judgment motion) (JA1073, 1407-08, 1435, 1616-17).

C. *The Special Master's Actual Bias*

1. *Disparate Application of Discovery Guidelines*

Plaintiffs and nonparty dealers were required to produce tax returns and detailed price, cost and revenue information (JA264, 318-19, 372-74).[3] Mr. Wallace did not compel compliance with plaintiffs' discovery requests on the same subject. The company simply failed or refused to produce evidence of (1) costs and overall rate of return (JA266, 284, 317-18, 372-73), (2) statements by the company's experts on market definition issues (JA266, 309-10), and other critical economic data relative to (3) advertising (JA318, 372), and (4) the auditing procedures of the Audit Bureau of Circulations (JA282). The company's cost information was critical to plaintiffs' contention that the company competed against them at a price which was less than the company's costs.

Plaintiffs' requests of defendant MCI Corporation concerning problems with telephone operators, including transmission of misleading information to subscribers and disparagement of the dealers, went unmet (JA376), although Mr. Wallace required that plaintiffs supply detailed answers to interrogatories concerning disparaging remarks and other problems with telephone operators (JA137).

2. *Inaction and Delay*

Mr. Wallace failed to rule or delayed rulings for long periods of time. For example, plaintiffs' March 1983 request to expand the scope of discovery was denied as premature in June 1983 (JA161). An August 1983 request was also denied as premature (JA177). Yet when plaintiffs proceeded by motion on a briefing schedule set by the special master commencing in May 1984 (JA307-08), their request, denied by the special master in September 1984, was described as "untimely" (JA389).

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[3] For the relevance of this information to plaintiffs' case, see pp. 8-16, *infra*.

3. *Misstatements*

Mr. Wallace attributed admissions to plaintiffs which were untrue, inaccurate or misleading. For instance, Mr. Wallace stated in his June 22, 1984 draft of the "Proposal of Certain Conclusions of Law and Issues for Pretrial Order" that

> Plaintiffs claim that a $4.00 [per week] price was suggested by NYT as a regular resale price although the $4.00 price was generally not charged and was never the price for any plaintiff in his regular sales, which at all times were significantly in excess of $4.00.

(JA332.) This statement is untrue as the prices charged by plaintiffs during the relevant period were as low as $11.95 for a four week period (JA2087). Plaintiffs' protests regarding such inaccurate or misleading statements attributed to them by the special master could not be effectively documented due to the repeated denial by Mr. Wallace and the District Court of plaintiffs' requests for leave to have a court reporter transcribe the conferences (JA268-69, 771, 773-74, 810).

D. *The Decision of the Court of Appeals*

Although acknowledging that the special master's employment by Cahill Gordon in the *M & R* and *Caspray* cases "may not have been timely disclosed," the Court of Appeals concluded that "[i]n total Wallace's relationship with Cahill Gordon did not rise to the level requiring disqualification or vacatur" (App. 16).

The Court of Appeals found that

> Wallace's role as special master in the district court proceedings ceased long before the argument and submission of defendants' summary judgment motion, and his role was limited to controlling discovery subject to review by Judge Zampano and assisting in the framing of issues. Judge Zampano's opinion did not rely on any factual findings or legal conclusions made by Wallace.

(App. 17). Based on these findings, the Court of Appeals held that there was no basis for plaintiffs' claim that Mr. Wallace's

relationship with Cahill Gordon tainted the District Court's judgment (App. 17).

The Court of Appeals' findings were incorrect. Mr. Wallace billed for 1985 (JA1545), for January 1986 (JA1546), for February 1986 (JA1628) (the month in which the summary judgment motion was argued) and for March 1986 (JA1627) thus proving his involvement in the case right up to and beyond submission of the summary judgment motion. His statements included no detail as to the nature of the services he performed. Nor did Mr. Wallace merely play a neutral role "limited to ... assisting in the framing of issues" (App. 17). Mr. Wallace submitted to the District Court comprehensive proposed findings of fact and conclusions of law on issues determined by the District Court (JA320-70, 399-414).

De novo review of the discovery rulings which shaped the evidence for summary judgment was rarely conducted by the District Court. For example, plaintiffs' June 1983 motion to review the special master's ruling on plaintiffs' application concerning the scope of discovery was referred back to the special master for "more detailed reasoning" (JA548-51) (the District Court incorrectly applied an appellate standard of review, not a *de novo* standard of review (JA545, 547-48)). Later the District Court ruled that the motion was premature and refused to decide whether to allow depositions denied by the special master (JA573-76). Plaintiffs' May 1984 motion to expand the scope of discovery (JA578, 725) was never decided.

II. *Factual Background of Antitrust Claims*

A. *The Joint Distribution System*

Plaintiffs are eight of the more than 400 independent morning newspaper home delivery dealers (the "dealers") in the tri-state New York metropolitan area which includes Connecticut and New Jersey (JA2173). Plaintiffs deliver a variety of morning newspapers, but more than 75 percent of their deliveries are of *The New York Times* (the "*Times*") (JA2172, 2302, 2394). Loss of their trade in the *Times* would destroy their businesses (JA2145-47, 2157-61).

Plaintiffs operate in much the same way as the 400 other dealers. The company sells newspapers to the wholesalers. The wholesalers sell newspapers to the dealers and deliver the newspapers (together with the newspapers of the other publishers) to the dealers' depots. The dealers set their own prices based on the wholesale price of the paper and the cost of delivery. The dealers bill customers directly and bear the risk of loss for non-payment (JA2173, 2176). The dealers are local businessmen who (1) efficiently manage all "stops and starts" for individual customers, (2) handle all customer complaints, and (3) run replacement copies to customers who require them (JA2157-61, 2172-76).

The dealers operate in exclusive territories pursuant to a cooperative distribution system (the "joint system") created decades ago by a New York publishers' association. Pursuant to the joint system the dealers delivered all morning home delivered newspapers of all member publishers (JA1705-09, 2174). The joint system was efficient because, among other reasons, it was less expensive to have one person delivering all the newspapers to subscribers in a given neighborhood or apartment building (JA1775, 2175, 2889-91).

Territorial assignments by the publishers' association were made by letters that often included maps delineating street boundaries (JA1707-09). The letters stated that if service fell below industry standards, "the Publishers *individually* reserve[d] the right to encourage the establishment of a supplementary delivery in all or part of the described area" (JA1708) (emphasis added). The publishers' association oversaw, promoted and approved all route sales (JA1705-09, 1781-82).

Until 1982 the exclusive territories were honored and enforced by the company — including settlement of boundary disputes (JA1713-30, 1781-84, 2174-75, 3083-87). The company itself has bought and sold routes (JA1765-73, 1783, 1786-87). The company and the dealers engaged in joint marketing for new customers and all new home delivery customers were assigned to the dealers as the company's "participating dealer" in their respective territories (JA2174-76, 2768, 2779-81).

On September 20, 1982, the company commenced, in Fairfield County, Connecticut (JA1954), a county by county unilateral withdrawal from the joint system. The company (1) ceased to refer new customers to the dealers, and (2) began to compete with the dealers in their historically exclusive territories by means of the company's "T-routes" – at a price lower than the company's cost of delivery ("T-route competition") (JA2183-86). New subscribers were offered service at $2.00 per week for eight weeks (JA48), which was less than the weekly $2.22 wholesale price to the dealers (JA2183). The regular home delivery price offered by the company at the end of the promotional period was $4.00 (JA48). Plaintiffs presented an undisputed 1982 estimate that the company's cost of delivery was in excess of $4.85 per week (JA2185).

T-route competition is challenged on theories of restraint of trade, monopolization and attempted monopolization (JA8-40). Plaintiffs contend that T-route competition will destroy the dealers' businesses, and thus the joint system, since the viability of their businesses depends on the dealers' trade in the *Times* (JA2115-16). By destroying the joint system and replacing the dealers with its own delivery agents, the company will acquire monopoly power in the market for newspaper home delivery in the New York metropolitan area (the "home delivery market") and in the Fairfield County submarket.

This power will enable the company to exclude its competitors in the relevant market – *i.e.*, the market for publication of daily newspapers of general circulation marketed throughout the New York metropolitan area (the "publishing market") (JA2106-12, 2129-44) – from the facilities of the home delivery market (JA2118-20, 3270-71). Since (1) revenues in the publishing market are derived almost entirely from the sale of advertising (JA1972, 2090), and (2) the ability of a newspaper to compete for the sale of advertising depends on the size and demographic profile of its circulation (JA1972-73), home delivery services are essential to competitors in the publishing market.

Consumers will be injured by elimination of the joint system because (1) they will be unable to obtain simultaneous home

delivery of all newspapers, (2) they will be unable to receive any home delivery of some newspapers (because many publications do not have enough home delivery circulation to make operation of their own home delivery systems economically feasible), (3) they will be unable to choose the personalized services of the local dealers instead of the "800 number" type service of the company, and (4) there may be increased prices of many consumer goods as a result of the company's freedom to raise its advertising rates.

Plaintiffs also allege that the company engaged in unlawful price fixing by threatening to institute, and by instituting, T-route competition against the dealers in an effort to coerce them into keeping their prices low (JA24-26). Defendant MCI Corporation, which later changed its name to Callcenter Services, Inc. ("CSI"), is an independent telephone solicitation firm (JA2994-95, 3020-21). CSI and the independent wholesalers[*] are alleged to have acted in concert with the company in price fixing activities (JA24-28).

B. *The Company's Dominant Power in the Publishing Market*

The company receives 80 percent of its revenue from advertising (JA1972 and App. 27); thus the significant market facts relate to advertising. The company's 1981 annual report stated that

> [t]he Times ... widened its share of the total advertising carried by New York's three general circulation dailies from 57 percent in 1980 to 60 percent [in 1981] (JA3127; as alleged in the amended complaint, JA15).

The company's two competitors in the publishing market are *The New York Daily News* (the "*News*") and *The New York Post* (the "*Post*"). In April 1984, a full page advertisement in the *Times* cost 37.6 percent more than the same advertisement in the *News* and nearly twice that in the *Post* (JA2140). The advertising rate

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[*] The Court of Appeals incorrectly identified wholesalers as defendants; wholesalers were unnamed coconspirators only.

for a full page in the *Times* went up 41.6 percent from 1979 to 1982 (JA2142). The *Times*' advertising rates went up 9 percent on January 1, 1984 (JA2957-58), and an additional 8.5% for 1986 (JA1653).

The company's senior vice president for advertising, Lance Primis, testified that he did not monitor the *Times*' competitors' advertising rates (JA2941). The company's ability to raise prices at will without regard to competitors' prices and at the same time increase its market share of advertising sales establishes the company's dominant position as a seller of advertising among publishers of daily newspapers in the New York metropolitan area.

In addition to their claim that the company had monopoly power in the publishing market, plaintiffs also offered a narrower market definition – the market for the publication of daily newspapers of general circulation distributed throughout the New York metropolitan area "directed to upscale readers" – in which the *Times* previously competed with the *New York Herald Tribune* but, with that paper's demise, became the sole occupant in the market. This market definition was rejected by the Court of Appeals as too narrow (App. 6-7).

C. *Conspiracy With The Wholesalers and Telephone Solicitors*

Proof that the wholesalers and CSI consciously abetted the company's below cost of delivery competition with the dealers included a series of "dirty tricks" such as preferential delivery of newspapers to T-route depots (JA2151-52, 2159-60, 2168-71, 2258, 2290, 2562-63, 2571-72, 2595, 2621-23, 2730-33) and statements to consumers by CSI's telephone solicitors that certain of the dealers were dead or out of business (JA 2154, 2522-25).

Mr. Montero, who testified for wholesaler Standard News, stated that Standard News always followed the company's "suggested" price for Standard News' sale of the *Times* to the dealers (JA2871-72). Standard News did not always follow the suggested price of other publishers (JA2871).

Standard News earned 9 cents more per week, per subscriber, "wholesaling" papers to the dealers than it earned in providing "trucking" services for the company's T-routes (JA2867-68). There is a legal distinction in the two relationships, but the independent wholesaler performs the same services for the dealers as it does for the company's T-routes (JA2853), *i.e.*, Standard News delivers papers to the dealers at their depots and delivers papers for the company's T-routes at its depots (JA2847-50).

D. *The Company's Price Fixing Activities*

In June 1975 the company hired Donald Nizen who, upon being employed by the company, immediately both called and met with certain of the dealers. He told the dealers that delivery "prices were ... too high" (JA2741), and that the company needed to be able to sell the newspaper at a "standard price" (JA2679). He said, "we have to set a price for the paper to be home-delivered" (JA2744-45).

Thereafter the company's "roadmen" consistently and continuously monitored the prices of all independent dealers throughout the New York metropolitan area (JA2646). Plaintiffs testified as to a pattern of threats and coercion with respect to their prices (JA2164-65, 2246, 2304-05, 2355-56, 2437-38, 2494, 2640, 2682, 2683, 2685, 2699-2700, 2706-07, 2746, 2757, 2760-61, 2793, 2989).

Prior to September 1982, T-routes were instituted in competition with some dealers because of price considerations (JA2639-40). After T-route competition was instituted against all dealers in Fairfield County, Connecticut in 1982, William F. May, an outside director of the company, wrote to subscribers who complained of T-routes stating that if the dealers got their prices down in response to "competition" from the company, then the company "would give distribution responsibilities back to the independents" (JA3168-74).

E. *The Decision of the Court of Appeals*

Based on the evidence that the company can charge higher advertising rates than the other two metropolitan area wide dailies

— the *News* and the *Post* — the Court of Appeals assumed for the sake of argument that the company did have monopoly power in a relevant market for the sale of advertising for daily newspapers circulated throughout the New York metropolitan area (App. 7).[5] Both the District Court and the Court of Appeals found that there could be no anticompetitive effect of the company's actions because "[p]laintiffs failed to offer any proof whatsoever that the Times' publishing competitors could not, in the absence of independent dealers, deliver their own newspapers directly to home subscribers" (App. 7-8).

This finding is incorrect. Robert Soltesz, a nonparty dealer, testified that home delivery of morning newspapers other than the *Times* is available in Fairfield County, Connecticut (a relevant geographic submarket) only through the dealers (JA3270-71). There was no evidence by defendants that any morning newspaper has its own direct delivery system in Fairfield County, Connecticut. Although a reported case and the affidavit by a company official cited by the court (JA1956) suggest that publishers may have some direct delivery service elsewhere, such delivery by rival publishers to discrete portions of the New York metropolitan area does not establish that they can economically effect direct delivery throughout the entire area.

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[5] The Court of Appeals assumed that the company possessed monopoly power in the publishing market after holding that the District Court had correctly found that the narrower proposed market definition which encompassed only the *Times* was legally insufficient and that based on circulation alone, the *Times* did not have a monopoly. The Court of Appeals also found that the publishing market was only raised for the first time on appeal despite plaintiffs' pleading and undisputed proof of the essential economic facts before the District Court. For instance, the special master's "Proposal of Certain Conclusions of Law and Issues for Pre-trial Order" defined the publishing market "claimed by plaintiffs to include "the integrated operation of the sale of advertising to advertisers and the sale of papers to the wholesalers" (JA323). Likewise plaintiffs' Local Rule 9(c) statement of issues of material fact listed advertising rates an an issue and affidavits of plaintiffs' experts in opposition to the motion for summary judgment detailed the company's power in the market for the sale of advertising (*e.g.*, JA2130, 2134-36, 2139-42, 2111-12).

Plaintiffs offered testimony that 75 per cent of their business was *Times* business (JA2172, 2302, 2394), and that the economic viability of their home delivery business depends on the *Times* business because of density considerations (JA2145-47, 2157-61). The other morning newspapers which collectively account for only 25 per cent of the morning home delivery business could not economically establish home delivery routes in Fairfield County and throughout the entire New York metropolitan area. A company official acknowledged the extraordinary cost of establishing a home delivery system throughout the metropolitan area (JA2763-67), and plaintiffs offered unrefuted evidence that the T-routes operate at a substantial loss — the 1982 weekly cost of T-route home delivery of at least $4.85 was well in excess of the 1982 T-route weekly home delivery price of $4.00 (JA2172-86). Given evidence that the company's cost of delivery exceeds its revenue, there is no economic reason why weaker rival publishers should (or could) establish their own direct delivery systems, particularly since the joint system has worked so efficiently for decades.

The evidence offered by the company that the T-route agents were "not prohibited" by the company from delivering the newspapers of other publishers (JA1955) is not evidence that the company's T-route agents are in fact available or suitable to deliver the newspapers of other publishers. Mr. Soltesz's testimony is direct evidence that the T-route agents do not deliver the newspapers of other publishers.

The Court of Appeals did not address plaintiffs' claims of price squeeze and monopoly leveraging. Plaintiffs had argued that it was an abuse of monopoly power for the company to use advertising profits to subsidize its own home delivery service unfairly in competition with plaintiffs. Even though the Court of Appeals assumed the company's monopoly power, it did not analyze the effect of the company's subsidy on plaintiffs — the company's only competitors in home delivery of the *Times*.

Finding that late deliveries and incidents of disparagement occurred only briefly at the beginning of the conflict between the

parties, the Court of Appeals held that these acts were not evidence of concerted action between the wholesalers, CSI and the company for purposes of the conspiracy claims. This finding is incorrect. The wholesalers' preferential deliveries to T-route depots continued through the time plaintiffs' brief on summary judgment was filed in 1985 (JA2152-53, 2169-70, 2794-95). Preferential treatment was apparently coordinated with intensive sampling by T-route drivers (JA2169, 2258, 2290), which tends to show an absence of independent action by the wholesalers.

The Court of Appeals also mistakenly found that the nine cents more per Sunday customer earned by the wholesalers by "wholesaling" to dealers than by "trucking" to T-routes reflected additional services rendered to dealers. In fact the nine cent charge was for the *same* services; any additional services to the dealers were charged to the dealers over and above the nine cent difference (JA 2864-65).

REASONS FOR GRANTING THE WRIT

I. *Disqualification of the Special Master*

A. *Conflict With Decisions of This Court and Other Circuit Courts*

Before the decision by the Court of Appeals, disqualification was required in every case in which a judicial officer had an actual or even potential economic relationship with a party or its counsel concurrent with the conduct of litigation by the party before the officer. *See, e.g., Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 147-49 (1968) (reversing arbitration award on ground that "neutral" arbitrator did not disclose that he occasionally served as consultant for party and had earned $12,000 working for party during previous six years including work on the projects involved in the lawsuit; Court had "no doubt" that a judge would be disqualified under same circumstances); *Pepsico, Inc. v. McMillen*, 764 F.2d 458, 460-61 (7th Cir. 1985) (requiring recusal where employment service contacted law firms for both parties on behalf of retiring judge); *Hall v. Small Business Administration*, 695 F.2d 175, 176-77 (5th Cir. 1983) (magistrate disqualified and judgment vacated when

law clerk on case was former member of plaintiff class and had accepted offer of future employment with its counsel); *Texaco, Inc. v. Chandler*, 354 F.2d 655, 656-57 (10th Cir. 1965), *cert. denied*, 383 U.S. 936 (1966) (judge disqualified because he was concurrently represented by plaintiff's counsel in an unrelated civil action); *Henry A. Knott Co. v. Chesapeake and Potomac Tel. Co.*, 772 F.2d 78 (4th Cir. 1985) (special master disqualified because he contracted to sell house to defendant's counsel); *United States v. Nobel*, 696 F.2d 231, 235-37 (3d Cir. 1982), *cert. denied*, 462 U.S. 1118 (1983) (judge's financial relationship to crime victim requires disqualification as judge in criminal trial absent waiver after full record disclosure); Canon 5C(1), Code of Judicial Conduct for United States Judges, 69 F.R.D. 273, 281 (1975) (App. 38-39).

While he served as special master, Mr. Wallace certainly had both a concurrent financial relationship and – based upon their long term, continuous dealings – a reasonable expectation of future employment by or through Cahill Gordon. By refusing to disqualify Mr. Wallace despite his undisclosed concurrent and potential future relationship, the Court of Appeals decision creates a conflict among the circuits in construing the standards for disqualification, and seemingly contravenes this Court's holding in *Commonwealth Coatings v. Continental Casualty*. Although defendants argued, and the Court of Appeals apparently agreed, that Mr. Wallace's concurrent employment as local counsel was insignificant, this attempt to quantify the pecuniary interest of a judicial officer was specifically rejected by this Court. In *Commonwealth Coatings v. Continental Casualty*, this Court held that it is not

> at all relevant, as the Court of Appeals apparently thought it was here, that "[t]he payments received were a very small part of [the arbitrator's] income ***." For in *Tumey* the Court held that a decision should be set aside where there is "the slightest pecuniary interest" on the part of the judge, and specifically rejected the State's contention that the compensation involved there was "so small that it is not to be regarded as likely to influence improperly a judicial officer in the discharge of his duty ***."

393 U.S. at 148 (citing and quoting *Tumey v. State of Ohio*, 273 U.S. 510, 524 (1927)) (footnotes omitted).

The provisions of 28 U.S.C. §455(a) and Canon 3C(1) of the Code of Judicial Conduct for United States Judges, 69 F.R.D. at 277 (App. 38),[6] have been uniformly construed to require disqualification whenever there is a reasonable basis to question a judge's partiality, regardless of whether there has been any actual impropriety. *See, e.g., Pepsico v. McMillen*, 764 F.2d at 460-61 ("The test for an appearance of partiality is ... whether an objective, disinterested observer fully informed of the facts ... would entertain a significant doubt that justice would be done in the case").

Another conflict among the circuits is raised by the Court of Appeals' decision concerning the issue of disclosure. There is no dispute that no disclosure was made on the record, and the Court of Appeals admonished the special master and Cahill Gordon for their "lax performance of their joint responsibility to ... make full and timely record disclosure of any possible basis for disqualification" (App. 17). The Court of Appeals' refusal to disqualify the special master, despite its finding that he and Cahill Gordon acted improperly in failing to make this disclosure, directly contradicts the plain language of 28 U.S.C. §455(e), which requires disqualification in the absence of record disclosure, and the decision of the Fifth Circuit in *Postashnick v. Port City Construction Co.*, 609 F.2d 1101, 1114-15 (5th Cir.), *cert. denied*, 449 U.S. 820 (1980) (judgment obtained after 33 day trial which generated 25 volume record reversed and remanded where judge's

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[6] The Court of Appeals did not question the applicability of 28 U.S.C. §455(a) to special masters. The statutory language of 28 U.S.C. §455(a) parallels that of Canon 3C(1) 69 F.R.D. at 277, which is expressly made applicable to special masters. *See Compliance with the Code of Judicial Conduct*, 69 F.R.D. 286 (1976) ("[a]nyone ... who is an officer of a judicial system performing judicial functions, including [a] ... special master ... is a judge for the purpose of this Code"). *See also In re Gilbert*, 276 U.S. 6, 9 (1928) (special masters "assume[] the duties and obligations of a judicial officer"); *Lister v. Commissioners Court, Navarro County*, 566 F.2d 490, 493 (5th Cir. 1978) (disqualifying special master and holding that a "special master 'should have no interest in or relationship to the parties ....' " [quoting 5A Moore's Federal Practice, ¶53-03]).

prior business and social relationship partially disclosed off the record and parties urged judge not to recuse himself; "under the express language of Section 455(e), the judge's [unrecorded disclosure at] pretrial conference proceedings cannot constitute a valid waiver"). No waiver is permitted under any circumstances under the Code of Judicial Conduct. *See* Canon 3D, 69 F.R.D. at 279; *Smith v. Sikorsky Aircraft*, 420 F.Supp. 661 (C.D. Cal. 1976).

The conflict among the circuits created by the Court of Appeals decision, and the decision's departure from this Court's holdings in the *Commonwealth Coatings* and *Tumey* cases, warrant review by this Court.

B. *Vacating the Judgment Below*

Mr. Wallace's disqualification requires reversal or vacatur and reassignment to a new judge on remand even though the District Court itself committed no impropriety. Mr. Wallace's extensive involvement with all aspects of the case, and his frequent reports to and *ex parte* contact with the District Court concerning issues of fact and of law, infect the entire case with an appearance of impropriety because it is impossible to know what effect his influence had on the District Court's decision. *See Aetna Life Ins. Co. v. Lavoie*, 106 S.Ct. 1580, 1590-91 (1986) (Blackmun, J., concurring).

In *Aetna Life Insurance Co. v. Lavoie*, 106 S.Ct. 1580 (1986), this Court vacated a decision of the Alabama Supreme Court on due process grounds because one of the nine judges who decided the case (the judge who cast the decisive vote in a 5-4 decision) was a litigant in another case which would be affected by the decision. *Id.* at 1587. In two strong concurring opinions, three justices stressed that any participation by a disqualified judge "*necessarily* imports bias into the deliberative process." *Id.* at 1590 (Brennan, J., concurring) (emphasis in original).

> [A] reviewing court may never discover the actual effect a biased judge had on the outcome of a particular case. We should not attempt the perhaps futile task of distilling [the

> disqualified judge's] particular contribution to determine whether the result would have been the same had he disqualified himself at the outset. I would not want other appellate courts to read the Court's opinion today to suggest that such an inquiry provides an *appropriate quotient of due process.*

Id. at 1591 (Blackmun, J., concurring) (emphasis added). *Cf. Oakley v. Aspinwall*, 3 N.Y. 547 (1850) (judgment vacated where one of five in majority on seven judge panel disqualified).

The holding in *Pepsico, Inc. v. McMillen*, 764 F.2d 458 (7th Cir. 1985), does not support a position that the special master's disqualification does not require reversal of the judgment. In *Pepsico*, the judge discovered the incident which formed the basis for his disqualification only days before the trial. Although the court did not rule on the effect of the judge's disqualification on his pretrial rulings, no ground for disqualification existed at the time those rulings were made. *Id.* at 461. Here, the incidents requiring disqualification occurred prior to the special master's appointment, at the time of his appointment, and during his service, so that an appearance of impropriety existed at the time of all of his decisions.

Likewise, defendants cannot rely on *Ransom v. S&S Food Center Inc.*, 700 F.2d 670 (11th Cir. 1983). In *Ransom* the disqualified judge ruled against the party with whom he had an extrajudicial connection and the replacement judge reviewed the entire record *de novo. Id.* at 672-73.

The special master's tainted rulings cannot be vitiated by the District Court's decision on summary judgment because the special master's actual bias in discovery rulings shaped the factual record presented to the judge, and the special master's *ex parte* conversations with the District Court, and submission to the District Court of extensive proposed findings of fact and conclusions of law (JA320 et seq.) including items which were inaccurate or misleading, may have affected the District Court's view of the case.

C. *Need for Clear Standards*

There would seem to be no case where the court should overlook the pernicious effect on due process and the credibility of the judicial system occasioned by undisclosed cash payments to a sitting judicial officer, no matter how large or small the amount. By definition, part-time judicial officers have ongoing law practices and businesses and therefore the potential for a conflict of interest is far greater for them than for full-time, life tenured judiciary who have little or no incentive to obtain concurrent or future employment from a party or its counsel. For this reason, special masters should be subject to even greater scrutiny than their full time counterparts. *See Commonwealth Coatings v. Continental Casualty*, 393 U.S. at 148-49; Clark, *Difficulties Encountered in a System of Masters*, 23 F.R.D. 569, 570 (1959).

Strict adherence to the provisions requiring complete record disclosure is the only way to ensure due process. Immediate record disclosure as required by 28 U.S.C. §455(e) would have avoided the present disqualification dispute.

There has been considerable recent concern about the demise of ethics in litigation in the face of a trend toward "hardball" litigation. The entire Winter 1987 issue of *Litigation*, entitled *Manners and Morals*, was devoted to this topic. That issue's preface stated the problem as follows:

> Because we want to win, we consider every tactic in the textbook. But do we also consider tactics that are *not* in the textbook — Such as tripping our opponent so that he stumbles and falls?
>
> If we try such a stunt, does the judge ignore our conduct, or does he make us pay a price more sharp than the stab of guilt that may follow?

13 Litigation 7 (1987). *See also* Miller, *A Report on the Morals and Manners of Advocates*, 29 Cath. Law. 103 (1984); Decker, *Fighting Fair: Attorneys Owe Candor to the Court and Their*

Opponents, 6 Cal. Law. 53(3) (1986). *See generally* Reiter, *Whatever Happened to Professional Courtesy?*, 61 Fla. B. J. 4(2) (1987); *Does a Lawyer Have to be a SOB to be a Success?*, 31 Current Med. for Att'ys 5 (1984); Lytton, *The Uncivil Practice of Law*, 68 A.B.A. J. 388 (1982).

The failure of the special master and Cahill Gordon to make disclosure corrupted the entire judicial process and destroyed the credibility of the outcome. This Court should make clear that aggressive litigation cannot overstep clear ethical boundaries.

II. *Summary Judgment*

Both the District Court and Court of Appeals based their summary judgment decisions on assumed facts not supported by the record — that competitors could deliver their papers themselves by setting up their own routes, that T-routes were available to competitors, that preferential treatment and acts of disparagement halted soon after institution of the T-routes, and that several plaintiffs "admitted" that they were not coerced in a price fixing scheme (App. 8-9, 12-13, 25n.7, 30, 32-34).

This Court recently set forth the burden of proving the right to summary judgment:

> [A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis of its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrates the absence of a genuine issue of material fact.

Celotex Corp. v. Catrett, 106 S.Ct. 2548, 2553 (1986) (quoting Fed.R.Civ.P. 56(c)).

Since plaintiffs offered evidence that, *inter alia*, (a) the destruction of the joint distribution system will leave consumers and other publishers without a viable method of home delivery of morning newspapers other than the *Times*, (b) the company's costs

for the home delivery of newspapers exceed its revenues, and (c) plaintiffs were the victims of price coercion, the company did not meet its burden of demonstrating "the absence of a genuine issue of material fact." *Id.* at 2553; *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

A. *Monopoly Power*

The Court of Appeals assumed that the company had monopoly power in the publishing market, and that the publishing market constituted a cognizable relevant market for antitrust purposes. The company's possession of 60 percent of the total advertising lineage in the relevant market (JA3127), its more than 40 percent increase in advertising rates over three years without regard to prices charged by its competitors (JA2141-42), and the substantial disparity between the company's high advertising rates and the low rates of its competitors (JA2140), evidence the company's monopoly power (JA2112), *i.e.*, its "power to raise prices without losing so much business that the price increase is unprofitable" *Olympia Equipment Leasing Co. v. Western Union Telegraph Co.*, 797 F.2d 370, 373 (7th Cir. 1986) (Posner, J.). *See National Collegiate Athletic Assoc. v. Board of Regents of the Univ. of Oklahoma*, 468 U.S. 85, 109 n.38 (1984) (adopting same definition of "market power").

Plaintiffs submitted proof to support two general theories of abuse of monopoly power in the publishing market: first, under *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), that the company ought not be allowed to compete with the dealers and second, under *United States v. Aluminum Company of America*, 148 F.2d 416 (2d Cir. 1945), that the company, if permitted to compete, must compete fairly.

1. *Monopolization*

The company's institution of T-routes effected a fundamental change in the decades old distribution system which was developed with the company's participation in a competitive environment at a time when the company was not a monopolist. By depriving competitors and potential competitors of the essential distribution system, the company engaged in monopolization

in violation of Section 2 of the Sherman Act. *See Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985) ("*Aspen Skiing*"); Krattenmaker & Salop, *Anti-Competitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price*, 96 Yale L.J. 209 (1986).

In *Aspen Skiing* the relevant market consisted of the four major downhill ski facilities in Aspen, Colorado. From 1971, when each of the four areas was owned separately, until 1977, visitors to Aspen were able to purchase multi-area tickets which gave access to all four ski facilities. The proceeds of the multi-area tickets were divided among the operators of the ski facilities in proportion to the number of visitors to each facility. In 1978 the defendant ("Ski Co."), which by then owned three of the four Aspen ski facilities, discontinued participation in the multi-area ticket and thereafter offered only a three-area ticket for its own facilities. Damage to plaintiff ("Highlands"), in the form of steadily decreasing market share and revenues, ensued.

Highlands first attempted to mitigate its losses by purchasing Ski Co. lift tickets for resale to customers as part of its own package deal, but Ski Co. refused to sell lift tickets to Highlands. Highlands then offered an "Adventure Pack" with vouchers equal to the price of Ski Co. lift tickets, secured by funds on deposit at an Aspen bank, but Ski Co. refused to honor the vouchers. In *Aspen Skiing* this Court unanimously affirmed a jury verdict of monopolization, holding:

> [T]he monopolist [Ski Co.] elected to make an important change in a pattern of distribution that had originated in a competitive market and had persisted for several years.... [T]he evidence supports an inference that Ski Co. was not motivated by efficiency concerns and that it was willing to sacrifice short run benefits [of selling lift tickets to Highlands or honoring its "Adventure Pack" vouchers] and consumer good will in exchange for a perceived long-run impact on its smaller rival.

472 U.S. at 603, 610-11.

This case presents the exact situation addressed by *Aspen Skiing* because:

> (a) The independent distribution system is procompetitive because it encourages competition among publishers based upon the quality, editorial content and price of their newspapers without any cost to the publisher for home delivery service;
>
> (b) it originated in a competitive environment as a cooperative venture at a time when the company did not have monopoly power;
>
> (c) it has persisted and functioned efficiently for decades;
>
> (d) publishers affected by the destruction of the system would be unable to "fight back" effectively because of the diseconomies of home delivery of their publications alone in the low density areas which comprise a large portion of the relevant geographic market;
>
> (e) the company's withdrawal from the system has resulted in great expense and inefficiency to the company, indicating that the company is willing to sacrifice short term profits to obtain a competitive advantage; and
>
> (f) the company has engaged in predatory tactics beyond its abandonment of the system.

The company did not demonstrate a legitimate business purpose in instituting T-routes since (1) it did not dispute plaintiffs' estimates that the company's costs exceeded its revenues, and (2) it failed to document whether advertising revenue would increase to cover these increased costs. Also, because the company raises its advertising rates without regard to the rates of its competitors in the publishing market, both of which have greater circulation, the effect of T-route circulation increases on advertising rates is questionable. Thus, even if the company commenced its T-route program with legitimate efficiency goals, its continuation despite its below cost operation is evidence of the different goal of denying to competitors and potential competitors access to the joint distribution system.

Plaintiffs offered proof that competitors could not home deliver their newspapers through the company's T-route agents and that the cost of setting up the competitors' own distribution system throughout the metropolitan area would be prohibitively expensive because of low density circulation (*see* pp. 9, 15, *supra*).

2. *Price Squeeze and Monopoly Leveraging*

An illegal price squeeze and monopoly leveraging is established by the company's use of its monopoly power in the publishing market to set its wholesale price so high, in relation to the company's retail price — which is subsidized by the company's advertising income from the publishing market — that plaintiffs are placed at a severe competitive disadvantage in the home delivery market. *United States v. Aluminum Company of America*, 148 F.2d 416 (2d Cir. 1945) ("*Alcoa*").

In *Alcoa*, the defendant, a monopoly producer of aluminum ingot, sold aluminum sheet (which is made from ingot) in competition with other fabricators. Based on evidence that the defendant's price differential between ingot and sheet was less than the cost of fabricating the sheet from the ingot, Judge Learned Hand found it "unquestionable" that the defendant was exercising its power over competing fabricators so as to violate Section 2 of the Sherman Act. *Id.* at 438.

Plaintiffs need not be put out of business to prove their monopoly leveraging claim. *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 275-76 (2d Cir. 1979), *cert.denied*, 444 U.S. 1093 (1980). "That the competition in the leveraged market may not be destroyed but merely distorted does not make it more palatable. Social and economic effects of an extension of monopoly power militate against such conduct." *Id.* at 275. By selling morning home delivery services at a price which does not fully reflect the costs of providing that service, and by subsidizing these services with the profits of its publishing monopoly, the company gains an unfair and unlawful competitive advantage over more efficient competitors in the home delivery market as did Alcoa over its competitors in the aluminum sheet market.

The Court of Appeals did not address the price squeeze and market leveraging claims and thus left standing the District Court decision which incorrectly found that the subsidies were not legally significant because the company had integrated its functions as publisher and home deliverer into a unitary business (App. 24-26). Home delivery service and newspaper publishing are two separate businesses addressed to two separate markets. *See Paschall v. Kansas City Star Co.*, 727 F.2d 692, 700 n.7 (8th Cir.) (en banc), *cert. denied*, 469 U.S. 872 (1984) (where the vertical integration of a publisher into home delivery was described as "more like an acquisition of another business than ... an internal expansion").

B. *Price Fixing*

The coercive business climate occasioned by the company's threats to institute T-routes if prices were not kept down or if price promotions were not implemented according to the company's specifications is sufficient to require a trial of plaintiffs' coercion claims. *See Albrecht v. Herald Co.*, 390 U.S. 145 (1968); *Yentsch v. Texaco, Inc.*, 630 F.2d 46, 53 (2d Cir. 1980); *Arnott v. American Oil Co.*, 609 F.2d 873, 884 (8th Cir. 1979), *cert.denied*, 446 U.S. 918 (1980).

Deposition testimony cited by the Court of Appeals in which some (but not all) plaintiffs stated that they were not personally "threatened," was elicited in response to patterned questions designed to elicit those responses, and must be considered in light of substantial testimony by those same plaintiffs of specific instances of coercion by the company — a factual issue which makes summary judgment inappropriate. *See Wakefield v. Northern Telecom, Inc.*, 813 F.2d 535, 540-41 (2d Cir. 1987). The class action claims of the original complaint were dropped in the amended complaint (JA8), and therefore each plaintiff's claim ought to have been considered separately.

Price uniformity is not a prerequisite to the maintenance of a price-fixing claim. Plaintiffs had only to show that their independent judgment as to prices was affected by threats and a coercive climate. *See World of Sleep Inc. v. La-Z-Boy Chair Co.*,

756 F.2d 1467, 1477 (10th Cir.), *cert. denied*, 474 U.S. 823 (1985). Plaintiffs' real complaint is not that fair competition is forcing them to lower prices, but that the company has used the threat of T-route competition to affect plaintiffs' pricing behavior.

C. *Incomplete Discovery*

Summary judgment should only be granted "after adequate time for discovery...." *Celotex v. Catrett*, 106 S.Ct. at 2552-53. Discovery was ordered closed by the special master more than a year and one half before submission of the summary judgment motion and without ruling on many outstanding requests for discovery (JA264, 308). Summary judgment should not have been granted without a finding on plaintiffs' motions for discovery on various material issues including T-route costs and revenues and without permitting plaintiffs to update discovery with information which (a) did not exist when discovery was ordered closed (JA734-36), (b) is solely within the company's knowledge, and (c) bears directly on the plausibility of the company's alleged business justification. *See Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738, 746 (1976).

Plaintiffs' written statements in the affidavit of their counsel (JA734-36), in counsel's representations to the District Court in the motion to expand the scope of discovery (JA580-665, 692-709, 726-30), and in counsel's statements in plaintiffs' summary judgment brief and to the District Court during argument of the summary judgment motion (JA3215, 3219), satisfy the spirit and intent of Rule 56(f) to notify the District Court that discovery is incomplete. *See Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986); *Wallace v. Bronwell Pontiac-GMC Co.*, 703 F.2d 525, 527 (11th Cir. 1983); *Littlejohn v. Shell Oil Co.*, 483 F.2d 1140, 1145-46 (5th Cir.), *cert. denied*, 414 U.S. 1116 (1973).

The circumstances of this case present a fitting occasion for illustration by this Court of the application of the standards that should govern summary judgment as set forth in *Celotex Corp. v. Catrett*, 106 S.Ct. 2548 (1986), *Anderson v. Liberty Lobby*, 106 S.Ct. 2505 (1986) and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

CONCLUSION

This case currently stands as the only reported decision in which a court declined to disqualify a federal judicial officer who received compensation from a party's counsel during the course of litigation. That this went undisclosed for years renders the District Court's and the Court of Appeals' refusals to disqualify a truly dangerous precedent. Certiorari should be granted to make clear that such conduct will not be tolerated in the federal judicial system, and that record disclosure as required by the Code of Judicial Conduct and 28 U.S.C. §455 must be made.

Certiorari should also be granted because this case presents an opportunity to illustrate the guidelines set forth in this Court's recent summary judgment decisions.

Respectfully Submitted,
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December 1987

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1351—August Term, 1986

(Argued June 17, 1987 Decided August 7, 1987)

Docket No. 87-7280

ROSEMARY BELFIORE, d/b/a NUTMEG NEWS, MURRAY BERMAN, d/b/a BERMAN NEWS SERVICE and MURRAY'S NEWS SERVICE, BROOKWOOD SERVICES CORPORATION, GREENACRES COM NEWS LTD., GROVE NEWS SERVICE, INC., ZIGMUNT POPLASKI, d/b/a Z & J NEWS SERVICE, RICHARD RITTER, d/b/a GREENFIELD HILLS NEWS SERVICE, and ERIC SCOTT, d/b/a NEW CANAAN/SCOTTY'S NEWS SERVICE,

Plaintiffs-Appellants,

—v.—

THE NEW YORK TIMES COMPANY and MCI CORPORATION,

Defendants-Appellees,

HAROLD BALL, JR., d/b/a BALL NEWS SERVICE, ERIC SCOTT, d/b/a NEW CANAAN/SCOTTY'S NEWS SERVICE, ROSEMARY BELFIORE, d/b/a NUTMEG NEWS, MURRAY BERMAN, d/b/a BERMAN NEWS SERVICE and MURRAY'S NEWS SERVICE, SALVATORE BEL-

FIORE, d/b/a NUTMEG NEWS and JAMES J. HILL, d/b/a MUKE'S NEWS,

Third-Party Defendants,
Defendants on Counterclaim.

Before:

OAKES, MESKILL and PRATT,
Circuit Judges.

Appeal from a judgment entered in the United States District Court for the District of Connecticut, Zampano, *J.*, which granted defendants' motion for summary judgment against plaintiffs' allegations of abuse of monopoly, attempt to monopolize and conspiracy to monopolize in violation of section two of the Sherman Act, 15 U.S.C. § 2, and price fixing and conspiracy in restraint of trade in violation of section one of the Sherman Act, 15 U.S.C. § 1. Plaintiffs also appeal from the denial of certain of their discovery requests, the denial of leave to amend the complaint and the denial of their motion to disqualify the special master.

Affirmed.

PETER G. EIKENBERRY, New York City (Paul R. Levenson, Marilyn B. Fagelson, New York City, of counsel), *for Appellants.*

DENIS MCINERNEY, New York City (George Freeman, The New York Times Co., New York City, Charles Platto, Patricia Farren, David S. Smith, Cahill Gordon & Reindel, New York City, of counsel), *for Appellee The New York Times Co.*

John E. Lee, New Haven, CT, Ronald J. Cohen, Tyler Cooper & Alcorn, New Haven, CT, on the brief, *for Appellee MCI Corp.*

MESKILL, *Circuit Judge*:

This is an appeal from a judgment entered in the United States District Court for the District of Connecticut, Zampano, *J.*, which granted the motion for summary judgment offered by defendants, The New York Times Co. (the Times), several newspaper wholesalers that distribute *The New York Times* and MCI Corporation (now named Callcenter Services, Inc. and hereinafter CSI), an independent telephone soliciting firm employed by the Times. *Belfiore* v. *New York Times Co.*, 654 F.Supp. 842 (D. Conn. 1986). Plaintiffs are independent morning newspaper home delivery dealers. They allege that defendants have abused monopoly power, conspired to monopolize and attempted to monopolize under section two of the Sherman Act, 15 U.S.C. § 2 (1982), and fixed prices and conspired with others in restraint of trade under section one of the Sherman Act, 15 U.S.C. § 1 (1982). Plaintiffs' Sherman Act claims arise from the Times' decision to compete with them in the home deliv-

ery of *The New York Times*. Plaintiffs also appeal from the district court's denial of certain of their discovery requests and their motion for leave to amend the complaint. Finally, plaintiffs appeal from the district court's order denying their motion to disqualify for bias the special master, complaining that the alleged bias now requires vacatur and remand for new proceedings. For the reasons that follow, we reject plaintiffs' contentions and affirm the judgment below.

BACKGROUND

The Times publishes *The New York Times*. The Times distributes *The New York Times* through newspaper wholesalers, who distribute it (and other newspapers such as *The New York Daily News* and *The New York Post*) to independent morning delivery dealers, such as plaintiffs, and to retail outlets. The Times holds no ownership interest in the wholesalers or the independent dealers.

Plaintiffs deliver morning newspapers in exclusive territories located in Fairfield County, Connecticut. A New York publishers' association established these territories several years ago. Pursuant to the territorial allocations, the plaintiffs deliver all of the association's members' papers, and other papers, to home subscribers. Plaintiffs allege that over seventy-five percent of their deliveries are of *The New York Times*.

Prior to September 1982, plaintiffs experienced no competition in their territories. Thereafter, however, the Times instituted its own home delivery system in Fairfield County (the T-Route system), allegedly in response to a precipitous decline in home subscriptions over the preced-

ing four years. The T-Route system delivers *The New York Times* to home subscribers in competition with plaintiffs, who concede that they still are able to purchase and deliver *The New York Times* and the other newspapers they traditionally have carried to their customers. Through its T-Routes the Times has gained fifteen percent of the home delivery market in Fairfield County.

Plaintiffs filed this action in September 1982. The district court appointed a special master, Kenneth Wallace, to supervise discovery and pretrial proceedings. Wallace formerly had been associated with defendants' counsel, Cahill Gordon & Reindel, and briefly served in unrelated legal matters as local counsel for Cahill Gordon during his tenure as special master. This relationship prompted plaintiffs to move to disqualify Wallace under 28 U.S.C. § 455 (1982), which motion the district court denied. Plaintiffs appeal from this ruling, as well as from the district court's denial of certain of their discovery requests and their motion for leave to amend the complaint.

DISCUSSION

A. *Merits*

In reviewing the grant of summary judgment, we recently explained

> that while [it] is a valuable means for avoiding unnecessary trials, and recent Supreme Court as well as Second Circuit cases have tended to encourage its use in complex cases such as this one, . . . it should not be regarded as a substitute for trial. Thus, while the Supreme Court has indicated that trial courts should draw only reasonable inferences in favor of

> the non-moving party viewing the evidence as a whole, . . . and while some assessing of the evidence is necessary in order to determine rationally what inferences are reasonable and therefore permissible, it is evident that the question of what weight should be assigned to competing permissible inferences remains within the province of the factfinder at trial.

Apex Oil Co. v. *DiMauro*, slip op. 3735, 3749 (2d Cir. June 17, 1987) (citations omitted). Applying these principles, we review the district court's judgment as to each of plaintiffs' claims.

1. *Abuse of Monopoly*

Monopolization in violation of section two requires a showing of " 'two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.' " *Hayden Publishing Co.* v. *Cox Broadcasting Corp.*, 730 F.2d 64, 68 (2d Cir. 1984) (quoting *United States* v. *Grinnell Corp.*, 384 U.S. 563, 570-71 (1966)).

In the district court, plaintiffs alleged that the Times monopolizes the "general interest daily newspapers directed primarily to upscale readers" market. 654 F.Supp. at 846. As the district court noted, this market definition is implausible as a theoretical matter. Plaintiffs' narrow definition is an awkward attempt to conform their theory to the facts they allege; this market definition does not reflect any relevant market evidenced in the record. *See Grinnell Corp.*, 384 U.S. at 590-91 (Fortas, *J.*, with Stewart, *J.*, dissenting) (criticizing narrow market defini-

tions tailored only to those activities in which defendants engage; relevant market includes alternative sources of and substitutes for defendants' product reflecting "commercial realities").

The district court, looking to a relevant market defined in terms of general circulation daily newspapers, determined that plaintiffs failed to counter the Times' evidence that it does not possess a monopoly in Fairfield County. The Times produced uncontradicted evidence that *The New York Daily News* and *The New York Post* have greater circulation than *The New York Times*. J. App. at 1950-51. The district court's holding that the Times does not possess monopoly power in this market is not error.

On appeal, however, plaintiffs proffer a new market definition. Plaintiffs for the first time theorize that the Times monopolizes the market for the sale of newspaper advertising throughout the New York metropolitan area and that any injury to independent home delivery dealers would further that monopoly. Plaintiffs' advertising monopoly allegation rests on the Times' ability to charge higher advertising rates than do the publishers of *The New York Daily News* and *The New York Post*. Plaintiffs' abuse of monopoly theory rests on the premise that the Times will force out the independent dealers through the T-Routes. Having destroyed the independents, the Times allegedly would thereby exclude newspapers that compete with it for advertising dollars from access to the home delivery market, thus strengthening its advertising monopoly, which depends to a large degree on home delivery circulation.

Assuming *arguendo* that plaintiffs' theory should be heard for the first time on appeal, we reject it. Plaintiffs

failed to offer any proof whatsoever that the Times' publishing competitors could not, in the absence of independent dealers, deliver their own newspapers directly to home subscribers. Plaintiffs have not countered the district court's suggestion, and the Times' contention, that the T-Routes themselves are available to deliver the Times' publishing competitors' papers. *See* 654 F.Supp. at 849. The record also suggests that several other publishers have instituted their own direct delivery networks, J. App. at 1956. *See Martindell* v. *News Group Publications, Inc.*, 621 F.Supp. 672, 674 (E.D.N.Y. 1985) (discussing direct delivery of *The New York Post*).

As the district court noted, vertical integration even by a monopolist publisher "does not, without more, offend Section 2." 654 F.Supp. at 847 (citing cases), *see, e.g.*, *Bowen* v. *New York News, Inc.*, 522 F.2d 1242 (2d Cir. 1975), *cert. denied*, 425 U.S. 936 (1976); *Paschall* v. *Kansas City Star Co.*, 727 F.2d 692 (8th Cir.) (in banc), *cert. denied*, 469 U.S. 872 (1984); *White* v. *Hearst Corp.*, 669 F.2d 14 (1st Cir. 1982); *Knutson* v. *Daily Review, Inc.*, 548 F.2d 795 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977). Summary judgment was proper on the monopolization claim.

2. *Attempt to Monopolize*

Plaintiffs have not pursued this claim on appeal. We deem it abandoned. *See Cloutier* v. *Town of Epping*, 714 F.2d 1184, 1189 n.2 (1st Cir. 1983).

3. *Price Fixing*

Plaintiffs allege that the Times engaged in vertical price fixing through coercion in violation of section one of the Sherman Act. "[A] supplier may not use coercion on its

retail outlets to achieve resale price maintenance." *Simpson* v. *Union Oil Co.*, 377 U.S. 13, 17 (1964); *see generally Yentsch* v. *Texaco, Inc.*, 630 F.2d 46, 52-53 (2d Cir. 1980). The testimony of several of the plaintiffs, however, indicated that they were not threatened or coerced. Moreover, the record, largely composed of plaintiffs' depositions, reveals that their prices varied widely and were substantially higher than the Times' delivery prices. This pricing evidence confirms that no coerced pricing occurred. *See Reborn Enterprises, Inc.* v. *Fine Child, Inc.*, 590 F.Supp. 1423, 1439 (S.D.N.Y. 1984), *aff'd per curiam*, 754 F.2d 1072 (2d Cir. 1985). Plaintiffs' real complaint is that competition from the Times is pressuring them to lower their prices. Such competition is precisely the conduct the antitrust laws were designed to foster, not suppress. *See Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977). Summary judgment here was correct.

4. *Conspiracy to Restrain Trade*

Plaintiffs contend that CSI and the newspaper wholesalers conspired with the Times to unreasonably restrain trade in the sale of home delivered newspapers in violation of section one. This claim requires proof (1) that two or more of the defendants "entered into a 'contract, combination . . . or conspiracy,' and (2) that the conspiracy was 'in restraint of trade or commerce among the several States.' " *International Distribution Centers* v. *Walsh Trucking Co.*, 812 F.2d 786, 793 (2d Cir. 1987) (quoting 15 U.S.C. § 1), *cert. denied*, 55 U.S.L.W. 3820 (U.S. June 8, 1987). The district court rejected this claim on alternative grounds. The court held that, as a matter of law, CSI and the wholesalers did not have the capacity

to conspire with the Times and, even if they did, there was insufficient evidence of the alleged conspiracies.

(a) *Capacity to Conspire*

Judge Zampano ruled that there was no possibility of "[c]oncerted action between two or more distinct economic entities" because CSI and the wholesalers were "agents [without] the legal capacity to conspire with the Times." 654 F.Supp. at 850 (footnote omitted). The court correctly noted that capacity to conspire is determined by the economic realities of the alleged coconspirators' relationship, and accurately recited the applicable rationale and underlying elements we articulated in *Fuchs Sugars & Syrups, Inc.* v. *Amstar Corp.*, 602 F.2d 1025, 1031 n.5 (2d Cir.), *cert. denied*, 444 U.S. 917 (1979). *See* 654 F.Supp. at 850 n.11.

The district court's application of these principles, however, was incorrect. The court, in concluding that neither CSI nor the wholesalers had the capacity to conspire with the Times, reasoned: " '[I]f it is not an antitrust violation for a manufacturer to change his distribution system, then it can hardly be evidence of an illegal conspiracy that the manufacturer seeks merely to secure the personnel to man this new system.' " 654 F.Supp. at 850 (quoting *Fuchs*, 602 F.2d at 1031). Parties performing discrete steps in the distribution or manufacturing chain, however, frequently have been held liable for conspiring in violation of section one. *See, e.g.*, *Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U.S. 752, 765 (1984) (supplier and its distributor conspired to maintain resale prices and terminate price cutters in violation of section one); *Bowen*, 522 F.2d at 1256 (newspaper publisher conspired with franchised dealers to cut off

price cutters' supply in violation of section one). The salient question is not whether, by vertically integrating, the supplier could perform the alleged coconspirator's function; rather, the proper inquiry focuses on whether the alleged coconspirators are economically distinct entities.

The district court pointed to one characteristic of CSI's relationship with the Times of conceivable relevance under *Fuchs*. The court noted that "CSI works under contract to the Times to respond to incoming customer calls." 654 F.Supp. at 850. This relationship might suggest CSI's independence from the Times if it reflected CSI's function as being "other than securing an offer from a buyer for the [Times'] product," *Fuchs*, 602 F.2d at 1031 n.5, but the district court did not address it in these terms or point to facts suggesting that this was or was not the case.

As to the wholesalers, the district court noted only that the wholesalers are compensated on a per paper basis and do not bear the risk of loss for unsold papers. This factor, while relevant, standing alone cannot support the district court's ruling made in the context of summary judgment. *See Bulkferts, Inc.* v. *Salatin, Inc.*, 574 F.Supp. 6, 8 (S.D.N.Y. 1983) (denying defendants' motion for summary judgment on capacity to conspire issue because of complexity of requisite factual analysis). As the Seventh Circuit recently explained, "the terms of the agency agreement do not always resolve the issue whether the antitrust laws have been violated." *Morrison* v. *Murray Biscuit Co.*, 797 F.2d 1430, 1439 (7th Cir. 1986); *see id.* at 1438 (noting "continuum bounded at one end by the manufacturer's full-time employees and at the other by vast, autonomous distribution enterprises").

As a result of our holding here that there was insufficient *evidence* of the alleged conspiracies, *see* Part (b), *infra*, we need not determine whether CSI or the wholesalers actually were capable of conspiring with the Times. We stress, however, that proper inquiry into capacity to conspire requires a thorough application of the *Fuchs* principles to the facts, including the number and nature of the agent's functions, *Morrison*, 797 F.2d at 1438, whether the agent acts in its own interests or in the supplier's, *Victorian House, Inc.* v. *Fisher Camuto Corp.*, 769 F.2d 466, 469 (8th Cir. 1985), and whether the alleged coconspirators are in reality under the control of a single individual or entity. *Harvey* v. *Fearless Farris Wholesale, Inc.*, 589 F.2d 451, 455-58 (9th Cir. 1979).

(b) *Evidence of Conspiracy*

The Times employed CSI, a telephone marketing company, to handle incoming calls regarding the T-Routes. The Times' decision to institute the T-Route system was not a violation of the antitrust laws. *See* Parts A.1 and 2, *supra*. The Times' hiring of CSI to help implement the T-Routes, therefore, does not of itself evince an "antitrust 'conspiracy.' " *Bowen*, 522 F.2d at 1254. The sole evidence of conspiratorial behavior consists in a few isolated and nonrecurring instances in which CSI falsely disparaged some independent dealers. There is no evidence, however, that the Times knew of or encouraged this behavior. *Cf. id.* at 1256 (evidence that newspaper publisher instructed alleged coconspirators "to tell customers in their areas that the independent route dealers were no longer in business" probative of section one conspiracy). Plaintiffs' evidence simply does not " 'tend[ ] to exclude the possibility' that the alleged conspirators acted inde-

pendently.' " *Matsushita Electric Indus.* v. *Zenith Radio Corp.*, 54 U.S.L.W. 4319, 4322 (U.S. Mar. 25, 1986) (quoting *Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U.S. 752, 764 (1984)), and cannot give rise to a reasonable inference of conspiracy.

Turning to the alleged vertical conspiracy between the wholesalers and the Times, plaintiffs' evidence consisted of the allegation that the wholesalers discriminated against them in favor of T-Routes in the timing of deliveries. Plaintiffs failed to substantiate their claim. Some plaintiffs even admitted that any delays in delivery were temporary and in any event did not cause real harm. *See* J. App. at 2590-93, 2795. Plaintiffs' other evidence of a conspiracy consists of the additional fees for additional services that the wholesalers charge plaintiffs and other independent dealers. Without more, this evidence cannot give rise to a reasonable inference that the wholesalers did not act independently. There simply is no evidence of concerted behavior.

Plaintiffs similarly failed to show that the alleged conspiracy was anticompetitive in effect either in the home delivery market or the newspaper advertising market. The uncontroverted evidence establishes that the T-Routes *created* competition in the home delivery market; prior to the Times' entry, plaintiffs enjoyed complete monopolies in their respective exclusive territories. As to possible anticompetitive consequences at the publishing level, plaintiffs' claims rest solely on the speculation rejected at Part A.1, *supra*. There is no evidence of a restraint on the distribution of newspapers at any level.

Summary judgment was proper on the conspiracy to restrain trade claim.

5. *Conspiracy to Monopolize*

"The essence of [this] offense[ ] is an agreement entered into with the specific intent of achieving monopoly." *Northeastern Telephone Co.* v. *American Telephone & Telegraph Co.*, 651 F.2d 76, 85 (2d Cir. 1981), *cert. denied*, 455 U.S. 943 (1982); *see International Distribution Centers*, 812 F.2d at 795-96 & n.8. The record is bereft of any evidence that the wholesalers harbored the proscribed intent to monopolize. The record is similarly barren with respect to CSI's intent. Even if the Times did possess the requisite intent to achieve a monopoly in any market, a proposition resoundingly rejected by the district court, 654 F.Supp. at 848, this claim would fail for lack of evidence that the intent was shared by agreement with another party.

We, therefore, affirm the district court's disposition of the defendants' motion for summary judgment.

B. *Interlocutory Rulings*

Plaintiffs appeal from the district court's denial of certain discovery requests and of leave to amend the complaint. Each of these rulings is subject to reversal only for abuse of discretion. *Robertson* v. *National Basketball Association*, 622 F.2d 34, 35-36 (2d Cir. 1980) (discovery rulings); *Evans* v. *Syracuse City School District*, 704 F.2d 44, 47 (2d Cir. 1983) (leave to amend the complaint). The district court denied plaintiffs' request for the Times' cost, pricing and other practices in its relationships with dealers outside the Fairfield County area and for cost data relating to the T-Routes. The denial was "with leave to broaden discovery at a later date," J. App. at 118, in the event plaintiffs made some showing of need or relevance. *See id.* at 118-20. Plaintiffs never did

so. Plaintiffs likewise failed to comply with Fed. R. Civ. P. 56(f), which requires the opponent of a motion for summary judgment who claims to be unable to produce evidence in opposition to the motion to file an affidavit describing the nature of the requested discovery, its relevance to genuine issues of material fact, what efforts the affiant has made to obtain the discovery and why those efforts were unsuccessful. *See Burlington Coat Factory Warehouse Corp.* v. *Esprit De Corp.*, 769 F.2d 919, 926 (2d Cir. 1985). The district court did not abuse its discretion in its discovery rulings.

Plaintiffs offered their amended complaint fourteen months after defendants moved for summary judgment. It asserted no newly discovered material facts and did not explain the delay. We find no abuse of discretion here.

C. *Bias Claim*

Plaintiffs contend that the failure of the special master, Kenneth Wallace, and defendants' counsel, Cahill Gordon, to disclose fully their relationship required Wallace's disqualification from the district court proceedings and that the relationship now requires vacatur of the district court's judgment. Wallace spent fourteen years as a Cahill Gordon associate ending in 1960, twenty-three years before his appointment as special master. Cahill Gordon occasionally referred business to Wallace after he left the firm and employed Wallace as local counsel in a case in which his involvement terminated before he became special master, except for the drafting of a stipulation of discontinuance. Wallace also procured service of a subpoena in another case for Cahill Gordon approximately eight months after his appointment. Wallace has

never worked on any matter regarding the parties in the instant case. J. App. at 1568.

On January 22, 1986, the district court conducted a hearing on Wallace's petition to be paid a portion of the $236,397 in fees generated during his service prior to 1986. At this hearing, plaintiffs complained that Wallace had failed to disclose adequately his relationship with Cahill Gordon. *See* J. App. at 1454-1532. The transcript of this proceeding reveals that only Wallace's employment as local counsel and his procurement of the subpoena may not have been timely disclosed.

In total, Wallace's relationship with Cahill Gordon did not rise to the level requiring disqualification or vacatur. *Compare Pepsico, Inc.* v. *McMillen*, 764 F.2d 458, 460-61 (7th Cir. 1985) (ordering recusal where employment service retained by presiding district judge contacted law firm, one of the counsel for the defendants in the underlying action, regarding possible employment of judge; test for disqualification is "whether an objective, disinterested observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt that justice would be done in the case"); *Hall* v. *Small Business Admin.*, 695 F.2d 175, 176-77 (5th Cir. 1983) (magistrate erred in refusing to disqualify himself where "magistrate's sole law clerk was initially a member of the plaintiff class in [the underlying] suit, had [prior to] her employment with the magistrate expressed herself as convinced of the correctness of [the plaintiff class'] contentions, and accepted employment with its counsel before judgment was rendered"), *with National Auto Brokers* v. *General Motors Corp.*, 572 F.2d 953, 958-59 (2d Cir. 1978) (motion to disqualify properly denied where district judge formerly a member of law

firm representing defendant but never worked on any matter involving defendant except for an opinion letter), *cert. denied*, 439 U.S. 1072 (1979); *Singer* v. *Wadman*, 745 F.2d 606, 608 (10th Cir. 1984) (district judge's former partnership with defendant's lawyer does not require disqualification), *cert. denied*, 470 U.S. 1028 (1985). Moreover, Wallace's role as special master in the district court proceedings ceased long before the argument and submission of defendants' summary judgment motion, and his role was limited to controlling discovery subject to review by Judge Zampano and assisting in the framing of issues. Judge Zampano's opinion did not rely on any factual findings or legal conclusions made by Wallace. Not surprisingly, plaintiffs wholly fail to offer an intelligible basis for their claim that the relationship tainted the district court's judgment.

Our rejection of plaintiffs' claim, however, does not end the matter. Plaintiffs' claim arises from Cahill Gordon's and Wallace's lax performance of their joint responsibility to investigate and make full and timely record disclosure of any possible basis for disqualification. *See generally Code Of Judicial Conduct For United States Judges*, 69 F.R.D. 273, 286 (1975) (Code of Judicial Conduct applicable to special masters). Cahill Gordon apparently perceives that informal conversation, rather than documented disclosure, suffices. J. App. at 1494. We emphasize that failure to make record disclosure creates a two-fold dilemma: it hinders effective appellate review and invites potentially frivolous bias claims by disappointed litigants. We trust that counsel will make better record disclosure in the future.

The judgment of the district court is affirmed.

Rosemary BELFIORE, et al., Plaintiffs,

v.

The NEW YORK TIMES COMPANY, et al., Defendants.

Louis GUIMOND, Plaintiff,

v.

The NEW YORK TIMES COMPANY, Defendant.

Civ. A. Nos. B-82-554 (RCZ), B-82-242 (RCZ).

United States District Court, D. Connecticut.
Dec. 23, 1986.

Peter Hearn, Pepper, Hamilton & Scheetz, Philadelphia, Pa., J. Daniel Sagarin and William B. Barnes, Hurwitz & Sagarin, Milford, Conn., Richard M. Rindler, Arthur M. Adelberg and Robert J. Dominguez, Pepper Hamilton & Scheetz, Washington, D.C., Peter G. Eikenberry and Marilyn B. Fagelson, New York City, for plaintiffs in Belfiore case.

Lawrence W. Iannotti and Ronald J. Cohen, Tyler Cooper & Alcorn, New Haven, Conn., Dennis McInerney, Charles Platto and Patricia Farren, Cahill Gordon & Reindel and George Freeman, New York Times, Co., New York City, for New York Times Co.

John Lee, New Haven, Conn., for Callcenter Services, Inc.

Alan Neigher and Judith M. Trutt, Westport, Conn., for plaintiff Guimond.

RULING ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

ZAMPANO, Senior District Judge.

FACTS

The plaintiffs, independent newspaper delivery dealers, instituted this private anti-trust action against the New York Times Company ("the Times") when it expanded its "T-Route" system of direct home delivery of newspapers into Fairfield County, Connecticut.[1]

I.

For over fifty years, delivery of the Times' newspaper in Fairfield County was available only through independent route dealers such as plaintiffs.[2] The independent dealers purchased the newspapers from wholesalers and, in turn, resold the newspapers to their home delivery customers. The Times held no ownership interest in the wholesalers' or independent dealers' businesses.

In September 1982, due to what the Times asserts were legitimate business reasons stemming from a four-year decline in home delivery circulation, the Times extended its T-Route system of newspaper distribution into the areas of Fairfield County previously served by the independent dealers. Under the T-Route distribution system, the Times' newspapers are delivered to home subscribers without the intermediate assistance of the independent dealers.

The plaintiffs contend that this expansion of the Times' T-Route system constitutes unlawful conduct which irreparably harms the independent dealers. While conceding they can still purchase and deliver the Times' newspaper to their customers,

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[1] The *Guimond* suit was filed prior to the *Belfiore* suit, after the Times began T-Route delivery in the area of a single Fairfield County dealer, Louis Guimond. For purposes of this motion, plaintiff Guimond has adopted the *Belfiore* plaintiffs' Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment.

[2] The admitted sponsor and orchestrator of this litigation is the Metropolitan Routedealers Association ("MRA"), a trade association. Since at least 1977,

(Footnote continued)

they point out that the Times no longer refers new subscribers to them and offers lower prices to subscribers who accept T-Route delivery. These practices, it is argued, make it impractical for them to compete against the T-Route system and soon they will be out of business.

The Amended Complaint, seeking damages and injunctive relief, alleges five counts under Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1 and 2: Section 1 price fixing (Count 1); Section 1 restraint of trade (Count 2); Section 2 monopolization (Count 3); Section 2 attempted monopolization (Count 4); and Section 2 conspiracy to monopolize (Count 5).[3] Specifically, plaintiffs seek to prohibit the Times from using any persons or businesses other than themselves or other independent dealers to provide home delivery of the Times' newspaper in Fairfield County, and to enjoin the Times from providing home delivery of its product at a price below that which the plaintiffs can provide.

DISCUSSION

The central issue in this suit is the legality under Sections 1 and 2 of the Sherman Act of the Times' decision to modify its distribution system to provide direct home delivery in areas previously served exclusively by the independent dealers. In light

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the MRA has been amassing a "legal fund" to challenge the Times should it ever attempt to modify or eliminate the independent dealer system of home delivery. *See* Dep. of B. Hochhauser, President of the MRA, at pp. 452-460 and Hochhauser Exhibits 15 & 47. The MRA's objective, as summarized by one Fairfield County dealer who chose not to be a plaintiff, is "getting the Times to get the hell out of my area." D. Young Dep. at p. 317.

[3] Four pendent state claims are also alleged: unfair methods of competition under the Connecticut Unfair Trade Practices Act, Conn.Gen. Stat §42-110b *et seq.* (Count 6); violation of the Connecticut Antitrust Act, Conn.Gen.Stat. §35-26 *et seq.* (Count 7); violation of the Connecticut Franchise Act, Conn.Gen.Stat. §42-133e (Count 8); and tortious interference with contract (Count 9). In light of the resolution of the present motion, the Court need not address their merits.

of the absence of any genuine issue of material fact, *see Combustion Engineering, Inc. v. Consolidated Rail Corp.*, 741 F.2d 533, 536 (2 Cir.1984); Fed.R.Civ.P. 56(c), and the line of federal cases which have upheld the right of newspaper publishers to assume responsibility for all or part of the retail distribution of their products,[4] summary judgment in favor of defendants is granted.[5]

Section 2 Abuse of Monopoly Power

Plaintiffs claim that the Times possesses monopoly power in the publication of daily newspapers in various geographic markets. These areas allegedly include Fairfield County, Connecticut, and the New York City metropolitan area. More specifically, in the course of an issue-definition process before a Court-appointed Special Master, plaintiff defined the relevant market for the Times' alleged publishing monopoly as "general interst daily newspapers directed primarily to upscale readers," and defined "upscale" readers as those meeting two or more of the following criteria: total household earnings of $35,000 or more, a college degree, and/or a professional/managerial type job. Plaintiffs further contend that the Times is using its alleged

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[4] *See e.g., Paschall v. Kansas City Star Co.*, 727 F.2d 692, 704 (8 Cir.) (en banc), *cert. denied*, 469 U.S. 872, 105 S.Ct. 222, 83 L.Ed.2d 152 (1984) ("[W]e find it hard to ignore that every other antitrust case brought against a newspaper publisher challenging the newspaper's decision to forwardly integrate into distribution has been resolved in favor of the newspaper").

[5] In *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473, 82 S.Ct. 486, 491, 7 L.Ed.2d 458 (1962), the Supreme Court stated that "summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot." However, later in *First Nat'l Bank v. Cities Service Co.*, 391 U.S. 253, 88 S.Ct. 1575, 20 L.Ed.2d 569 (1968), the Supreme Court made it clear that Fed.R.Civ.P. 56(e) should not be read out of antitrust cases. While recognizing the importance of preserving litigants' rights to a trial on their claims, the Court was "not prepared to extend those rights to the point of requiring that anyone who files an antitrust complaint setting forth a valid cause of action be entitled to a full-dress trial notwithstanding the absence of any significant probative evidence tending to support the complaint." *Id.* at 288-90, 88 S.Ct. at 1592-93. In

(Footnote continued)

monopoly in the publishing market to gain a competitive advantage in the newspaper home delivery market. Abuse of monopoly power under Section 2 of the Sherman Act[6] has two elements:

1) the possession of monopoly power in the relevant market; and
2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S.Ct. 1698, 1703-04, 16 L.Ed.2d 778 (1966); *see also Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 268, 275 (2 Cir.1979), *cert denied*, 444 U.S. 1093, 100 S.Ct. 1061, 62 L.Ed.2d 783 (1980). As the second element makes clear, "[t]he mere possession of monopoly power does not *ipso facto* condemn a market participant." *Berkey*, 603 F.2d at 275. Rather, a Section 2 violation requires improper or anticompetitive use of monopoly power.

Plaintiffs have failed to convince this Court that any genuine issue of material fact exists with regard to the requisite elements of an abuse of monopoly claim. First, plaintiffs have not asserted facts to support a finding that the Times has a publishing

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Matsushita Electric Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986), the Supreme Court has reinforced the message of *Cities Service* that summary judgment is appropriate "if the factual context renders respondents' claim implausible—[and] if the claim is one that simply makes no economic sense. . . ." *Id.* at 1356. In accordance with this reasoning, the Second Circuit has affirmed the grant of summary judgment in antitrust cases. *Reborn Enter., Inc. v. Fine Child, Inc.*, 754 F.2d 1072 (2 Cir.1985); *Triple M. Roofing Corp. v. Tremco, Inc.*, 753 F.2d 242 (2 Cir. 1985); *Nifty Foods Corp. v. Great Atlantic & Pacific Tea Co.*, 614 F.2d 832 (2 Cir.1980); *Modern Home Inst., Inc. v. Hartford Accident & Indemnity Co.*, 513 F.2d 102 (2 Cir.1975).

In a separate opinion filed this date the Court has denied the plaintiffs' motion to file a second amended complaint.

[6] Section 2 of the Sherman Act makes it unlawful to "monopolize, or attempt to monopolize, or combine or conspire. . . to monopolize" any part of interstate or foreign commerce.

monopoly in a legally cognizable market. As defendants point out, plaintiffs "upscale readers" market definition is highly reminiscent of the " 'strange red-haired, bearded, one-eyed man-with-a-limp classification' " criticized by the Second Circuit in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 457 n.4 (2 Cir.1974).

Obviously, the narrower the market defined by plaintiffs, the easier it is to show possession of monopoly power in the relevant market. Plaintiffs' attempt to define the relevant market "from the product out" is rejected. The natural monopoly every manufacturer has in the production and sale of its own product cannot be the basis for antitrust liability. *Norridge News Agency, Inc. v. Chicago Tribune Co.*, 1983-2 CCH Trade Cas. ¶65,672 (N.D.Ill. 1983); *Neugebauer v. A.S. Abell Co.*, 474 F.Supp. 1053, 1059, 1062-64 (D.Md.1979). Similarly, plaintiffs' attempt to define the relevant market by virtue of the demographic profile of just some of its readers is legally insufficient.

Second, the hallmark of monopoly power is the "power to control prices or exclude competition." *Paschall v. Kansas City Star Co.*, 727 F.2d at 692, 695-96 n. 2. (8 Cir.) (*en banc*), *cert. denied*, 469 U.S. 872, 105 S.Ct. 222, 83 L.Ed.2d 152 (1984). Plaintiffs concede that among general circulation newspapers, the Times' newspaper is not dominant: the New York Daily News has the largest newspaper circulation in the New York metropolitan area, and sales of the New York Post may be at least equal to those of the Times' newspaper. This admission belies any finding that the Times is a monopolist, even under plaintiffs'contrived market definition.

Third, even if the Times enjoys a publishing monopoly in a legally cognizable market, plaintiffs' monopolization claim must fail. Vertical integration by monopolists can have procompetitive effects that are not violative of the Sherman Act. Unreasonable, anti-competitive actions must be distinguished from the valid exercise of business judgment in an effort to protect investments. Established law dictates that vertical integration into distribution by a monopolist publisher, even in refusal to deal cases, does

not, without more, offend Section 2 of the Sherman Act.[7] *See, e.g., Paschall v. Kansas City Star Co.*, 727 F.2d 692 (8 Cir.) (*en banc*), *cert. denied*, 469 U.S. 872, 105 S.Ct. 222, 83 L.Ed.2d 152 (1984); *Becker v. Egypt News Co.*, 713 F.2d 363 (8 Cir.1983); *White v. Hearst Corp.*, 669 F.2d 14 (1 Cir.1982); *Auburn News Co. v. Providence Journal Co.*, 659 F.2d 273 (1 Cir.1981), *cert. denied*, 455 U.S. 921, 102 S.Ct. 1277, 71 L.Ed.2d 461 (1982); *Knutson v. Daily Review, Inc.*, 548 F.2d 795 (9 Cir. 1976), *cert. denied*, 433 U.S. 910, 97 S.Ct. 2977, 53 L.Ed.2d 1094 (1977); *Norridge News Agency Inc. v. Chicago Tribune Co.*, 1983-2 CCH Trade Cas. ¶65,672 (N.D.Ill. 1983); *Neugebauer v. A.S. Abell Co.*, 474 F.Supp. 1053 (D.Md.1979); *Lamarca v. Miami Herald Publishing Co.*, 395 F.Supp. 324 (S.D.Fla.), *aff'd mem.*, 524 F.2d 1230 (5 Cir.1975).

As stated by the Court of Appeals for this Circuit in *Berkey Photo:*

> . . .the use of monopoly power attained in one market to gain a competitive advantage in another is a violation of §2, even if there has not been an attempt to monopolize the second market. It is the use of economic power that creates the liability. But, as we have indicated, a large firm does not violate §2 simply by reaping the competitive rewards attributable to its efficient size, nor does an integrated business offend the Sherman Act whenever one of its departments benefits from association with a division possessing a monopoly in its own market. So long as we allow a firm to compete in several fields, we must expect it to seek the competitive advantage of its broad-based activity—more efficient production, greater ability to develop complementary products,

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[7] As argued by defendants, allegations of interference with deliveries, disparagement and misinformation made at the outset of this litigation have not been substantiated, and plaintiffs have admitted that whatever problems may have existed at the start-up of the T-Route expansion have long since been alleviated. Memorandum of Law in Support of Defendants' Motion for Summary Judgment at 32 n. 16, and citations therein.

> reduced transaction costs, and so forth. These are gains that accrue to any integrated firm, regardless of its market share, and they cannot by themselves be considered uses of monopoly power.

603 F.2d at 276.

The thrust of the plaintiffs' position is that the Times is abusing its alleged publishing monopoly by placing itself in direct competition with the independent dealers. Thus, it is argued, that the vertical integration is a convenient device for "leveraging" from a monopoly at one stage of production to a monopoly in another. *See* R. Posner and F. Easterbrook, *Antitrust*, 869-76 (1981); *Berkey*, 603 F.2d at 275. To avoid such a supposedly illicit result, plaintiffs contend that the Times should charge lower prices to wholesalers who in turn would pass on the savings to independent dealers, or alternatively the Times should charge higher prices at the retail level.

However, the Times is not required to subsidize or guarantee the profitability of independent route dealers to avoid antitrust liability. The antitrust laws "were enacted for the protection of *competition, not competitors*," *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488, 97 S.Ct. 690, 697, 50 L.Ed.2d 701 (1977), and "[w]e must always be mindful lest the Sherman Act be invoked perversely in favor of those who seek protection against the rigors of competition." *Berkey*, 603 F.2d at 273. Plaintiffs have made no showing of an impact upon competition, as opposed to an impact on themselves, sufficient to transform the Times otherwise legitimate business activities into an antitrust violation.

Section 2 Attempt to Monopolize

Plaintiffs also claim that defendants have attempted to monopolize the sale of home delivered morning newspapers, particularly its own newspaper, in Fairfield County, Connecticut. Success on this claim depends on a showing of both (1) a specific intent to achieve monopoly power, and (2) a dangerous probability of successful monopolization of a relevant market. *Nifty*

Foods Corp. v. Great Atlantic & Pacific Tea Co., 614 F.2d at 832, 841 (2 Cir.1980).

A newspaper publisher's vertical integration into retail distribution does not, standing alone, provide evidence of a specific intent to monopolize, even if it is accomplished (unlike in the instant case) in a manner that will eliminate sales by independent dealers. *See, e.g., Auburn News*, 659 F.2d at 278. Moreover, liability based on specific intent can be negated where valid business justifications exist. *See United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 174, 68 S.Ct. 915, 937, 92 L.Ed. 1260 (1948); *Paschall*, 727 F.2d at 697.

The Times has presented unchallenged, legitimate business reasons for the modification of its distribution system and the expansion of its direct home delivery routes. During the four years prior to this decision, daily home delivery sales declined steadily from a high of approximately 249,100 to a low of 232,500. *See* April 3, 1985 Aff. of R. Lewis (Sr. V.P.—Circulation of the Times newspaper division) ¶7. It is beyond dispute that a newspaper publishers' profits are, at least in significant part, a function of advertising revenue which, in turn, depends on circulation volume. *See* P. Areeda, *Antitrust Law* §729.7a at 197-98 (1982 Supp.).[8] Indeed, the Times asserts that its sale of advertising accounts for more than 80% of its revenues. Clearly, sound business judgment supported the Times' action in 1982 to reverse the decline in its home delivery circulation. Further belying any specific intent by the Times to monopolize the home delivery market in Fairfield County are the uncontested facts that the Times did not increase its wholesale prices or refuse to deal with plaintiffs.

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[8] Professor Areeda interprets the controversy regarding publisher's vertical integration as follows:

> The antitrust controversy arises when the publisher decides to shift to self-wholesaling or self-retailing. There have been several motives for doing so. Perhaps most important is the publisher's conclusion that his circulation goals are not fully shared by an independent wholesaler. The latter's profits are entirely a function of his wholesale-retail margin and his volume, while the
>
> *(Footnote continued)*

Even if plaintiffs were successful in raising material factual issues on the specific intent element, their attempt to monopolize claim must fail because of the absence of any proof of a dangerous probability that the Times will monopolize any relevant distribution market.[9] Proof that independent dealers of the Times' newspaper may be eliminated as a result of the Times' vertical integration would not satisfy the "dangerous probability" element. *See Auburn News*, 659 F.2d at 278; *McDaniel v. Greensboro News Co.*, 1984-1 CCH Trade Cas. ¶65,792 (M.D.N.C. 1983); *Norridge News*, 1983-2 CCH Trade Cas. ¶65,672. Moreover, the Times' vertical integration is not likely to drive out competition because plaintiffs concede that they do not compete among themselves. Finally, as stated in *Auburn News*:

> publisher's profits are a function both of (1) the wholesale price, publication cost, and volume of newspapers sold and (2) advertising revenue, which also depends upon circulation volume. This means that increased circulation volume is more valuable to the publisher than to the dealer. . . . The implications are two-fold. The publisher has a greater incentive (1) to assure higher quality service to subscribers than an independent distributor and also (2) to eliminate any excess costs or margins at the distribution levels. Moreover, because the distributors do not compete with each other, there is no market pressure on the dealers to hold their margins down and service up. Of course, the publisher might attempt to supervise the dealer's service by contract, but precedent condemns the contractual limitation of maximum prices. The publisher may therefore conclude that self-distribution would improve service and minimize prices to subscribers.

[9] In an April 26, 1984 letter from A. Adelberg to the Special Master, plaintiffs more specifically defined the alleged market for this count as "the home delivery of morning newspapers in that portion of Fairfield County served by [wholesaler] Standard News Company." Because, even under the plaintiffs narrowly defined market, the Court finds that the second element of an attempt to monopolize claim is not satisfied, the Court need not reach the issue of whether this definition constitutes a legally cognizable market. *See, e.g., Neugebauer*, 474 F.Supp. at 1062 (rejecting argument that home delivery was separate market because it turned "on *how* defendant Abell distributed its product rather than on the nature of what was being distributed").

> The core of the distributors' case is that they cannot remain in business on the revenues secured from the sale of non-Journal publications. While this is unfortunate for them, we cannot mandate that the Journal, in effect, bear the distribution costs of its competitors by maintaining the old distribution network.

659 F.2d at 278.

The *McDaniel* case is instructive insofar as the court granted summary judgment for the publisher on plaintiff's attempt to monopolize claim where the plaintiff had defined an extremely narrow market – one in which it was the only independent dealer – and where there was evidence of the publisher pursuing vertical integration "in a harsh manner." *See* n. 7, *supra*. The Court found that the presence of competing newspapers even in the narrow market defined by plaintiff precluded a finding of dangerous probability.

> [W]ithout monopoly power or a dangerous probability thereof or some such adverse effect on competition, and not just on plaintiff as a competitor, the integration does not violate antitrust laws. The presence of the Eden Daily News, which has a greater circulation than the Greensboro Daily News, and the several other local newspapers in the alleged market belies any notion of monopoly power or dangerous probability of monopoly power in the distribution of newspapers.

1984-1 CCH Trade Cas. at 67,286. *See also Norridge News*, 1983-2 CCH Trade Cas. at 69,438 (fact that defendant did not interfere with plaintiffs' sales of other newspapers when it eliminated sales of its own newspaper to plaintiff was found to be inconsistent with an attempt "to corner distribution of other dailies").

In the case *sub judice*, the indisputable fact is that the Times accounts for less than 15% of daily newspaper circulation in Fairfield County. *Circulation, 1984-1985* (Twenty-third Annual

Circulation and Penetration Analyses of Print Media). Moreover, it is uncontested that the Times has not interfered with plaintiffs' sales of competing newspapers. As defendants' point out, even if all independent dealers of the Times' newspaper in Fairfield County served by Standard News were eventually eliminated, plaintiffs could not show an actionable affect on the newspaper market as a whole. In today's marketplace, many of the Times' competitors in the Fairfield area handle retail sales directly and do not rely on sales through independent dealers. Defendants' Memorandum of Law at 49. Because T-Route carriers are permitted to carry newspapers other than the Times' newspaper, *id.*, the expansion of T-Routes has actually increased the number of carriers available to distribute competing newspapers.

Plaintiffs have failed to raise issues of material fact under either prong of the attempt to monopolize test, therefore, this count of their complaint also fails.

Section 1 Conspiracy in Restraint of Trade and Section 2 Conspiracy to Monopolize

Two counts of conspiracy are alleged by plaintiffs. They contend that the defendants, in combination with their co-conspirators (wholesalers and operators of T-Routes), have unreasonably restrained trade in the sale of home delivered newspapers, and, particularly, the Times' newspaper. They further contend that the Times and defendant CSI[10] have combined and conspired to monopolize the sale of home delivered morning newspapers, and particularly the Times, in Fairfield County. These claims also must fail as a matter of law. Concerted action between two or more distinct economic entities is an essential element of a Section 1 violation and a conspiracy to monopolize in violation of Section 2. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984); *Fuchs Sugars & Syrups, Inc. v. Amstar Corp.*, 602 F.2d 1025, 1031 (2 Cir.), *cert. denied*, 444 U.S. 917, 100 S.Ct. 232, 62 L.Ed.2d 172 (1979).

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[10] Callcenter Services, Inc. ("CSI," sued as MCI Corporation), which serves as the "telephone agent" for the Times, is also a defendant in this suit.

The Times relies on the assistance of telephone and delivery personnel to handle incoming calls, customer solicitation and newspaper distribution on a fee basis. Delivery to individual households is made by carriers, who are paid a per-paper fee for delivery and bear no risk of loss with respect to T-Route sales. The newspapers are transferred in bulk to the carriers by wholesalers, who also are compensated on a per-paper basis and bear no risk of loss.

CSI works under contract to the Times to respond to incoming customer calls, and one or more telephone soliciting companies work under contract to offer home delivery to prospective customers. Finally, the Times relies on an outside computer company to handle billing and collections. It is beyond dispute that any of these entities participated in the Times' decisions regarding T-Route expansion or pricing and promotions.

None of these agents[11] has the legal capacity to conspire with the Times. As stated in *Fuchs:*

> [I]f it is not an antitrust violation for a manufacturer to change his distribution system, then it can hardly be evidence of an illegal conspiracy that the manufacturer seeks merely to secure the personnel to man this new system.

602 F.2d at 1031.

Even if plaintiffs could prove that the Times' agents had the capacity to conspire with the Times itself or played an independent role in the Times' expansion, their proof fails on the concerted action element of their conspiracy claim. There is no significant probative evidence that defendants shared a conscious commitment to an illegal scheme or the specific intent to achieve

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[11] Whether two actors constitute distinct economic entities for purposes of a Sherman Act violation is determined by the economic realities of their relationship. *Knutson v. Daily Review, Inc.*, 548 F.2d 795, 801-02 (9 Cir.1976). As noted in *Fuchs*, in the context of a principal/agent relationship this analysis

(footnote continued)

monopoly power. *See Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 764, 104 S.Ct. 1464, 1470-71, 79 L.Ed.2d 775 (1984).

Additionally, there is no evidence in the record that any agent of the Times was privy to its decisions as to policy and T-Route expansion. Plaintiffs allege that employees of CSI gave misinformation when responding to one or two sham inquiries from independent dealers pretending to be customers, and that wholesalers discriminated in favor of T-Routes in terms of timing and priority of bulk newspaper deliveries. However, even if true, these incidents do not constitute significant probative evidence of complicity in an illegal scheme. *See Cities Service*, 391 U.S. at 289, 88 S.Ct. at 1592-93; *Zenith*, 475 U.S. at ____, 106 S.Ct. at 1357 ("[plaintiff] must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed [plaintiff]").

Finally, as noted above, a publisher's vertical integration does not violate antitrust law, absent proof that it "was intended to or did bring about some restraint of trade beyond the loss of business suffered by a distributor or the market's loss of a distributor-competitor." *Knutson v. Daily Review, Inc.*, 548 F.2d 795, 803 (9 Cir.1976). As defendants' point out, this principle is consistent with the general rule in this Circuit that a conspiracy that reduces intrabrand competition does not violate Section 1 unless there is an anticompetitive effect on the industry as a

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requires consideration of a number of elements, including: whether the agent performs a function on behalf of his principal other than securing an offer from a buyer for the principal's product; the degree to which the agent is authorized to exercise its discretion concerning the price and terms under which the principal's product is to be sold; and whether use of the agent constitutes a separate step in the vertical distribution of the principal's product. If an actor is merely a "conduit" for another actor, there is not a Sherman Act violation. 602 F.2d at 1031 n. 5.

Review of these criteria in the case *sub judice* reveals that those entities described above were merely agents employed by the Times to implement its expanded system of direct distribution. *See* Amended Complaint ¶¶12, 13 (using "agents" characterization).

whole. *See, e.g., Oreck Corp. v. Whirlpool Corp.*, 579 F.2d 126, 130 n. 5, 133-34 (2 Cir.) *(en banc), cert. denied*, 439 U.S. 946, 99 S.Ct. 340, 58 L.Ed.2d 338 (1978). As discussed in connection with plaintiffs' attempt to monopolize claim, there is no evidence that the Times, through its T-Route expansion, intended to or did accomplish a restraint on the distribution of newspapers.

Section One Price Fixing

Plaintiffs allege that for at least four years prior to their filing the complaint in this action, the Times engaged in vertical price fixing through coercion in violation of Section 1.[12] They allege that the Times threatened to injure their businesses if they failed to follow its pricing demands and that their prices were generally depressed by an overall "atmosphere of coercion" as a result of comments and conduct on the part of the Times.

The combination required under Section 1 must be demonstrated by proof of:

(1) an express or implied agreement, or

(2) the securing of actual adherence to prices by means beyond mere refusal to deal.

Yentsch v. Texaco, Inc., 630 F.2d 46, 52 (2 Cir.1980); *see also, Simpson v. Union Oil Co.*, 377 U.S. 13, 17, 84 S.Ct. 1051, 1054, 12 L.Ed.2d 98 (1964) ("a supplier may not use coercion on its retail outlets to achieve resale price maintenance"). Plaintiffs have not raised issues of fact material to the essential elements of coercion and price adherence.

Evidence of pricing suggestions, conversations, arguments, or pressure is not sufficient to establish coercion. *Yentsch*, 630 F.2d at 53. Rather, evidence of threats or other explicitly coercive conduct is required. The admissions contained in the deposition testimony of the plaintiffs contradict the allegations of the Amended Complaint and confirm that the Times did not suggest

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[12] Section 1 of the Sherman Act states:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . .

a home delivery price (other than a promotional price for a stated introductory period for customers referred to independent dealers by the Times).[13] Furthermore, the plaintiffs were not coerced or threatened by the Times with respect to their pricing.[14] *See* Defendants' Memorandum at 60-63, and deposition citations contained therein.

Similarly, evidence obtained through plaintiffs' deposition testimony and interrogatory answers defeats their claim that they formed a combination with the Times by unwillingly adhering to prices set by it. *See* Defendants' Memorandum at 64-65, and discovery citations contained therein. This evidence reveals a wide disparity among the prices charged by the independent dealers for home delivery during the relevant period, rather than a uniform price, and also reveals that the independent dealers' prices were substantially in excess of the Times' prices.[15]

In view of this admitted absence of adherence to any uniform price fixed by the Times, even if plaintiffs' could substantiate

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[13] As noted by defendants, plaintiffs' counsel agreed in the course of the issue definition process before the Special Master, that to make out a vertical price fixing claim "[i]t is insufficient for a plaintiff to show that participation in a generally available market promotion of [the Times' newspaper] was conditioned by [the Times], acting independently, upon a dealer's compliance with the terms and conditions of the promotion, including price reduction, or that it would be unavailable to the dealer who did not adhere to the price." Report of Special Master, August 11, 1984, p. 17, ¶14.

[14] Plaintiff Blakeslee maintained in his deposition that he received direct threats on nearly every aspect of his business from every person in the Times' Circulation Department involved in home delivery in his area. *See* Blakeslee Dep. pp. 241, 728, 729. Even if this testimony were believable, it would not, standing in contrast to the overwhelming evidence in the record demonstrating the absence of coercion, be sufficient to defeat summary judgment. *See Reborn Enter., Inc. v. Fine Child, Inc.*, 590 F.Supp. 1423, 1440 (S.D.N.Y.1984) (one dealer's deposition testimony that he was threatened was insufficient to defeat summary judgment), *aff'd*, 754 F.2d 1072 (2 Cir.1985).

[15] For example, at the start of T-Route expansion, full-week service from a T-Route for a four-week period cost $16.00, while plaintiffs' prices for the same service ranged from more than $19 to almost $26.

their counsel's charge that the Times attempted to fix their prices by "threats, coercion and a pattern of intimidation," the law of this Circuit dictates a ruling in defendants' favor on the price fixing count. As stated by Judge Sofaer in *Reborn Enterprises*, and later affirmed by the Second Circuit

> For Reborn to avoid summary judgment on its price-fixing claim it must advance sufficient evidence to raise a genuine dispute as to whether defendants engaged in coercive activity to force adherence to its suggested retail price and plaintiff and other retailers actually adhered to that price . . . .
>
> Plaintiff has failed to raise a genuine dispute as to whether anyone adhered to the suggested price. The depositions of the various store owners reveal that several, including Ben's, Albee's, and Schneider's, sold above the suggested retail price, while at least two, Hatzlacha and Darlings, sold below it. These companies represented approximately half of the MacLaren accounts in New York.

590 F.Supp. at 1439.[16]

Finally, plaintiffs' attempt to make out a Section 1 violation by claiming that a so-called "atmosphere of coercion" prevailed throughout the New York metropolitan area over the past several years and created an unspecified downward pressure on prices, also must fail. Even if plaintiffs could show that their prices were generally depressed, their proof, as a matter of law, does not support a finding that an atmosphere of coercion existed. Plaintiffs' atmosphere of coercion theory is, rather, a thinly

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[16] The Second Circuit in *Yentsch* made clear what degree of "coercion" must be present to prevail on a price fixing claim:

> While evidence of exposition, persuasion, argument, or pressure is alone insufficient to establish coercion . . . threats of termination, as long as they secure adherence to the fixed price, have been deemed to trespass beyond the boundaries of *Colgate*, thereby triggering a finding of an illegal combination.

630 F.2d at 53.

disguised complaint that potential competition through vertical integration and promotional programs established by the Times impinged on the independent dealers' ability to exact whatever prices they chose.

The case law, however, makes clear that advertising of discount prices does not constitute coercion by a supplier even if such advertising causes an independent dealer's customers to expect or demand a lower price. *Jack Walters & Sons, Corp. v. Morton Buildings Inc.*, 737 F.2d 698, 707-09 (7 Cir.), *cert. denied*, 469 U.S. 1018, 105 S.Ct. 432, 83 L.Ed.2d 359 (1984). Some other, entirely legal, competitive market force may keep the dealers from raising their prices. Moreover, a dealer's concern, albeit normal, about possible vertical integration by its publisher is not actionable under the Sherman Act. *See Northwest Publications, Inc. v. Crumb*, 752 F.2d 473, 476 (9 Cir.1985); *Newberry v. Washington Post Co.*, 438 F.Supp. 470, 478-79 (D.D.C.1977).[17]

State Law Claims

Counts 6, 7, 8 and 9 are all pendent state claims. Under *United Mine Workers v. Gibbs*, 383 U.S. 715, 726, 86 S.Ct. 1130, 1139, 16 L.Ed.2d 218 (1966), since the Court is dismissing the federal claims in the case, it must dismiss the pendent claims as well.

CONCLUSION

For all of the foregoing reasons, summary judgment in favor of defendants is granted on plaintiffs' federal claims and plaintiffs' pendent state law claims are dismissed.

SO ORDERED.

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[17] The Court notes incidentally that to the extent that plaintiffs' atmosphere of coercion theory relies upon alleged coercive conduct occurring prior to September 20, 1978, it must fail. *See* 15 U.S.C. § 15b (establishing four-year statute of limitations). And alleged coercive acts applied to non-plaintiff dealers, cannot support plaintiffs' claims unless they had actual knowledge of and were directly affected by the same. *See Hewitt v. Joyce Beverages, Inc.*, 721 F.2d 625, 628 (7 Cir. 1983).

UNITED STATES COURT OF APPEALS SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 30th day of September one thousand nine hundred and eighty-seven.

Docket No. 87-7280

ROSEMARY BELFIORE, d/b/a NUTMEG NEWS, MURRAY BERMAN, d/b/a BERMAN NEWS SERVICE and MURRAY'S NEWS SERVICE, BROOKWOOD SERVICES CORPORATION, GREENACRES COM NEWS LTD., GROVE NEWS SERVICE, INC., ZIGMUNT POPLASKI, d/b/a Z & J NEWS SERVICE, RICHARD RITTER, d/b/a GREENFIELD HILLS NEWS SERVICE, and ERIC SCOTT, d/b/a NEW CANAAN/SCOTTY'S NEWS SERVICE,

Plaintiffs-Appellants,

—v—

THE NEW YORK TIMES COMPANY and MCI CORPORATION,

Defendants-Appellees,

HAROLD BALL, JR., d/b/a BALL NEWS SERVICE, ERIC SCOTT, d/b/a NEW CANAAN/SCOTTY'S NEWS SERVICE, ROSEMARY BELFIORE, d/b/a NUTMEG NEWS, MURRAY BERMAN, d/b/a BERMAN NEWS SERVICE and MURRAY'S NEWS SERVICE, SALVATORE BELFIORE, d/b/a NUTMEG NEWS and JAMES J. HILL, d/b/a MUKE'S NEWS,

Third Party Defendants,
Defendants on Counterclaim.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellants ROSEMARY BELFIORE ET AL,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

s/Elaine B. Goldsmith
Elaine B. Goldsmith, Clerk

CONSTITUTIONAL PROVISIONS, STATUTES AND CODES INVOLVED

The Fifth Amendment to the Constitution of the United States of America provides in pertinent part:

> No person shall be ... deprived of life, liberty, or property, without due process of law....

28 U.S.C. §455 provides in pertinent part:

> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> * * *
>
> (e)...Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

The Code of Judicial Conduct for United States Judges, Canon 3 provides in pertinent part:

> C. *Disqualification*
>
> (1) A judge shall disqualify himself in a proceeding in which his impartiality might reasonably be questioned ....
>
> D. (This provision which permitted a remittal of disqualification was deleted from the Code by the Judicial Conference in March 1975. Since that date a remittal of disqualification is not permitted under any circumstances.)

and Canon 5 provides in pertinent part:

> C. *Financial activities*
>
> (1) A judge should refrain from financial and business dealings that tend to reflect adversely on his impartiality, interfere with the proper performance of his

judicial duties, exploit his judicial position, or involve him in frequent transactions with lawyers or persons likely to come before the court on which he serves.

Fed.R.Civ.P. 56 provides in pertinent part:

(b) A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) ...The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

* * *

(f) Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

15 U.S.C. §1 provides in pertinent part:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

and §2 provides in pertinent part:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade

> or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony....

and §15(a) provides in pertinent part:

> Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

and §26 provides in pertinent part:

> Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws....

No. 87-1118

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ROSEMARY BELFIORE, d/b/a NUTMEG NEWS, MURRAY BERMAN, d/b/a BERMAN NEWS SERVICE and MURRAY'S NEWS SERVICE, BROOKWOOD SERVICES CORPORATION, GREENACRES COM NEWS LTD., GROVE NEWS SERVICE, INC., ZIGMUNT POPLASKI, d/b/a Z & J NEWS SERVICE, RICHARD RITTER, d/b/a GREENFIELD HILLS NEWS SERVICE, and ERIC SCOTT, d/b/a NEW CANAAN/SCOTTY'S NEWS SERVICE,

Petitioners,

—v.—

THE NEW YORK TIMES COMPANY and MCI CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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Counsel for Respondents

January 28, 1988

QUESTION PRESENTED

Whether this Court should review the lower courts' grant of summary judgment dismissing petitioners' Sherman Act claims (attacking a newspaper publisher's home distribution of its own newspaper) when:

(a) the decision below follows an unbroken line of cases rejecting similar claims;

(b) summary judgment was granted only after petitioners had years of extensive discovery, and yet failed to show a genuine issue of material fact requiring a trial; and

(c) the courts below placed no reliance on any finding or recommendation of the special master, and unanimously found that petitioners' attack on the special master (repeated in this Court) was unfounded in fact and in law.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1118

ROSEMARY BELFIORE, d/b/a NUTMEG NEWS, MURRAY BERMAN, d/b/a BERMAN NEWS SERVICE and MURRAY'S NEWS SERVICE, BROOKWOOD SERVICES CORPORATION, GREENACRES COM NEWS LTD., GROVE NEWS SERVICE, INC., ZIGMUNT POPLASKI, d/b/a Z & J NEWS SERVICE, RICHARD RITTER, d/b/a GREENFIELD HILLS NEWS SERVICE, and ERIC SCOTT, d/b/a NEW CANAAN/SCOTTY'S NEWS SERVICE,

Petitioners,

—v.—

THE NEW YORK TIMES COMPANY and MCI CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

A. The Antitrust Case

Respondent The New York Times Company ("The Times") owns and publishes *The New York Times*. For many years it sold its newspaper to wholesalers, who in turn sold to retail outlets (newstands and independent home delivery dealers such as petitioners).

Prior to 1982, petitioners enjoyed "mini-monopolies" on home delivery of The Times in their respective territories (App.

13).[1] In September 1982, in response to a serious decline in home sales over the preceding four years, The Times expanded its own home delivery system (the "T-Route" system) to supplement (but not supplant) sales by independent dealers (JA 1953-57).[2] The downward trend in The Times' home delivery circulation was a matter of critical concern to it because advertising revenue, which accounts for 80 percent of The Times' income, depends on circulation volume (JA 1952). The T-Routes offered potential home subscribers an alternative to the service provided by the petitioners, who are still able to purchase *The New York Times* at wholesale rates and resell it at a profit (JA 1955). As anticipated, this alternative service resulted in a number of new home delivery customers and an overall increase in home delivery circulation, while sales by independent dealers still account for most of that circulation (JA 1956-57).

Both before and after 1982, petitioners' prices for home delivery varied widely but were all substantially higher than The Times' home delivery prices and were periodically increased despite The Times lower prices (JA 2087).

Petitioners sued to enjoin competition from T-Routes on a full panoply of antitrust theories, including monopolization, attempt to monopolize, conspiracy to monopolize and to restrain trade,[3] and vertical price fixing (JA 38-39). After years

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1 The following abbreviations will be used in this brief: "Pet'n" for citation to the Petition for a Writ of Certiorari, "App." for citation to the opinions below reprinted in the Appendix to the Petition, and "JA" for citation to the joint appendix below.

2 Previously, T-routes were used only in those areas not serviced by independent dealers (JA 1949).

3 The Times' alleged co-conspirators are the independent contractors responsible for certain T-Route operations, such as delivery to T-Route carriers and telephone solicitation. One such agent is respondent Callcenter Services, Inc. ("CSI", formerly known as MCI Corporation), a telephone marketing company that handles incoming calls regarding T-Route operations (JA 2029).

of extensive discovery, during which tens of thousands of pages of deposition testimony and documents were amassed, the district court (Hon. Robert C. Zampano, Jr.) granted summary judgment. In affirming that ruling, the court of appeals observed: "Plaintiffs' real complaint is that competition from The Times is pressuring them to lower their prices. Such competition is precisely the conduct the antitrust laws were designed to foster, not suppress." (App. 9, citing *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977))

With respect to petitioners' monopolization claim, the court below agreed with the district court's finding that petitioners' product market definition ("general interest daily newspapers directed primarily to upscale readers") "is an awkward attempt to conform their theory to the facts they allege; *this market theory does not reflect any relevant market evidenced in the record*" (App. 6; emphasis added). Moreover, as the court stated:

> "[P]laintiffs failed to counter the Times' evidence that it does not possess a monopoly in Fairfield County. The Times produced uncontradicted evidence that *The New York Daily News* and *The New York Post* have greater circulation than *The New York Times*. J.App. at 1950-51. The district court's holding that the Times does not possess monopoly power in this market is not error." (App. 7)

Turning to an alternative market definition proffered by petitioners for the first time on appeal (*i.e.*, "the market for the sale of newspaper advertising throughout the New York metropolitan area"), the court resoundingly rejected petitioners' claim that the T-Route system would eventually deprive other publishers of the ability to have their newspapers home delivered. Noting that T-Route carriers were free to handle competing newspapers, and that many of The Times' competitors had already adopted direct delivery systems, the court said:

> "Assuming *arguendo* that plaintiffs' theory should be heard for the first time on appeal, we reject it. Plaintiffs failed to offer any proof whatsoever that the Times' publishing competitors could not, in the absence of independent dealers, deliver their own newspapers directly to home subscribers." (App. 7-8)

Finally, the court concurred in the district court's ruling that "vertical integration, even by a monopolist publisher, 'does not, without more, offend Section 2' " of the Sherman Act, citing prior decisions in the First, Second, Eighth and Ninth Circuit Courts of Appeals (App. 8).[4]

In affirming summary judgment for respondents on petitioners' vertical price fixing claim, the court indicated that petitioners' deposition testimony, as well as their widely varying (but consistently higher than T-Route) prices, affirmatively demonstrated that no coerced pricing had occurred (App. 9).[5] It also noted that any pressure on prices resulting from The Times' competition was fully consistent with the purposes of the antitrust laws (*id.*).

With respect to petitioners' conspiracy claims, the court ruled that summary judgment was properly granted because "[t]here simply is no evidence of concerted behavior" between The Times and its wholesalers (App. 13), and the only evidence cited as to CSI "simply does not ' "tend[ ] to exclude the possibility' that the alleged conspirators acted independently' ", and cannot give rise to a reasonable inference of conspiracy" (App. 12-13; citations omitted).

The court ruled, moreover, that petitioners had failed to show that the alleged conspiracy was anticompetitive in effect either in the home delivery market or the newspaper advertising market. It concluded:

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4 The court deemed petitioners' attempt to monopolize claim abandoned, since it was not pursued on appeal (App. 8).

5 As the petitioners state here, "The dealers set their own prices" (Pet'n 9).

> "The uncontroverted evidence establishes that the T-Routes *created* competition in the home delivery market; prior to the Times' entry, plaintiffs enjoyed complete monopolies in their respective exclusive territories. As to possible anticompetitive consequences at the publishing level, plaintiffs' claims rest solely on the speculation rejected [in connection with their abuse of monopoly claim]. There is no evidence of a restraint on the distribution of newspapers at any level." (App. 13; emphasis in original)

The court found no abuse of discretion in the district court's denial of petitioners' discovery requests and noted that, despite having the opportunity to do so, petitioners had failed to follow Fed. R. Civ. P. 56(f), which requires an affidavit describing the nature of requested discovery and why it is needed in opposing summary judgment. (*See* App. 14-15.)

B. Petitioners' Allegations Regarding the Special Master

As the court of appeals recognized, Special Master Kenneth D. Wallace had no role in the trial court's consideration of the merits of petitioners' case or the grant of summary judgment (App. 17). It is clear from the district court's opinion itself that the trial court did not rely on any factual findings or legal conclusions made by him. Instead, his role in the litigation had "ceased long before the argument and submission of defendants' summary judgment motion", and was at all times limited to mediating discovery disputes, occasionally ruling on them subject to *de novo* review by the court, and assisting the parties in refining their respective positions on disputed issues (App. 15-17). While the summary judgment opinion mentions the special master twice in passing, these references are to records of statements made by *petitioners*, which petitioners have never contended were incorrect. (*See* App. 17, 22, 34.)

Petitioners nevertheless seek vacatur of the judgment on the basis of the special master's alleged "economic relationship" with The Times' counsel, Cahill Gordon & Reindel (Pet'n 3). That "relationship" consisted principally of Mr. Wallace's

former employment as an associate at Cahill Gordon, ending some twenty-three years before his appointment in this case (JA 1570). That prior employment was admittedly known to petitioners' counsel when they *themselves* nominated Mr. Wallace.[6] Petitioners also point to Mr. Wallace's subsequent employment by an intermittent client of Cahill Gordon (again, decades before his appointment in this case) and the fact that Mr. Wallace served as Cahill Gordon's local counsel on a litigation (the *M&R* case) that was settled by Cahill Gordon shortly thereafter (JA 1571, 1576). This too was disclosed to petitioners' counsel before they consented to the special master's appointment (JA 1475-76, 1494), and not challenged until years later when petitioners argued that their consent to his appointment was ineffective because disclosure to their counsel by telephone and before Judge Zampano in chambers was not "record disclosure" (JA 1428 *et seq.*).

Petitioners' final assertion, that Mr. Wallace was "employed and paid by Cahill Gordon to perform legal services as local counsel in the '*Caspray*' case" during his term as special master (Pet'n 3), is a gross distortion. Shortly after his appointment, Mr. Wallace was asked to arrange service in Connecticut of a deposition subpoena on an emergency basis in connection with a case pending in the Southern District of New York, where Cahill Gordon's offices are located (JA 1485, 1577). That courtesy, for which he received $500 for his time and expenses, was Mr. Wallace's only contact with the case (JA 1577). It was unknown to any of the Cahill Gordon or Times lawyers working on this case until after the fact, when it was disclosed (JA 1485).

The special master was appointed, with the consent of all parties, in January 1983 (JA 132). He served without objection until January 1984, when petitioners made their first of four

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6 Judge Zampano recalled that Mr. Wallace (whom he had not met previously) was nominated for special master by petitioners' local counsel (JA 1495). The latter stated that he had satisfied himself at the time that Mr. Wallace's relationship with Cahill Gordon would not interfere with his ability to be fair and impartial in this case (JA 1486-87).

unsuccessful motions to revoke his appointment. (*See* JA 811 *et seq.*) Initially, they alleged inability to afford their share of the special master's fees (JA 811-44) and expressly disclaimed any criticism of Mr. Wallace's integrity or professional performance (JA 834). In their second motion, filed eight months later, petitioners argued that the special master's appointment deprived them of their right to a hearing before an Article III judge (JA 1070-84), even though Mr. Wallace was never empowered to issue final rulings. Again they made no mention of Mr. Wallace's previously disclosed relationship with Cahill Gordon.

Petitioners did not raise that relationship until December 1984, more than two years into the litigation, when they moved to vacate the special master's appointment on the ground that it created the appearance of partiality. (*See* JA 1355-59.) At the same time, they also moved for Judge Zampano's recusal because of his *ex parte* contacts with the special master in the normal course of their judicial duties in this case (*id.*); although that motion was denied as "bordering on the frivolous", the same argument was raised in petitioners' notice of appeal, and later abandoned. (*See* JA 1409-12, 1414-15, 1492.)

More than a year later, on January 22, 1986, petitioners again challenged the special master's appointment in response to Mr. Wallace's application for fee payments unilaterally withheld by petitioners. At that time Judge Zampano conducted an evidentiary hearing at which petitioners were permitted to examine Mr. Wallace under oath about his relationship with Cahill Gordon. (*See* JA 1454 *et seq.*) After considering testimony on all of the matters complained of in this Petition, the court rejected as "insubstantial" petitioners' objections to Mr. Wallace's appointment (JA 1496-97). Judge Zampano ruled that the only aspect of Mr. Wallace's relationship with counsel that was "arguably" material was his service as local counsel in the *M&R* case, which had been disclosed prior to his appointment as special master (JA 1496).

Nevertheless, petitioners again moved for disqualification of the special master in February 1986—ten months after the summary judgment motion was made, and on the eve of argument. (*See* JA 1428-29.) As here, petitioners argued that their consent to Mr. Wallace's appointment had been ineffective because the disclosures about Mr. Wallace's association with Cahill Gordon had not been made on the record. After the court's decision granting summary judgment, in which the special master was not involved, the motion was denied as moot (JA 1632).

On appeal, petitioners renewed their arguments about the special master's alleged bias and the informality of the disclosure about his contacts with Cahill Gordon. After careful examination of these claims, the court below concluded that "[i]n total, Mr. Wallace's relationship with Cahill Gordon did not rise to the level requiring disqualification or *vacatur*", and that petitioners had "wholly fail[ed] to offer an intelligible basis for their claim that the relationship tainted the district court's judgment" (App. 17). At the same time, the court noted that "failure to make record disclosure . . . hinders effective appellate review and invites potentially frivolous bias claims by disappointed litigants" (*id.*).

SUMMARY OF ARGUMENT

The decision below follows an unbroken line of cases upholding the right of newspaper publishers to take over direct distribution of their product and rejecting antitrust challenges by terminated independent dealers. These precedents apply *a fortiori* to The Times' less drastic decision to reverse the downward trend in its home delivery sales by offering potential subscribers an alternate service without replacing the independent distributors.

Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985), on which petitioners place substantial reliance, is not inconsistent with these decisions or at all relevant

to this case. It did not involve a manufacturer's decision to establish direct distribution in competition with independent dealers, but rather dealt with a monopolist's refusal to deal in order to drive its only competitor out of business. Here, in contrast, the "uncontroverted evidence establishes that the T-Routes *created* competition in the home delivery market" (App. 13; emphasis in original), and petitioners' allegations of possible anticompetitive effects at the publishing level "rest solely on . . . speculation" (*id.*).

The conclusion that petitioners had not satisfied their burden of showing a genuine issue of material fact was fully justified, as demonstrated by each of the meticulous and unanimous decisions below. The Petition virtually ignores the trial court's carefully documented analysis of the factual record, affirmed by the court below, and offers only petitioners' own view of the facts—largely unsupported by record references. (*See, e.g.*, Pet'n 25, arguing alleged facts contrary to those found by the courts below in an effort to show that "this case presents the exact situation addressed in *Aspen Skiing*.")

Finally, the rejection below of petitioners' disqualification and vacatur arguments does not raise any issue worthy of review by the Court. As the court of appeals found, the facts here did not warrant disqualification of the special master, and petitioners "wholly fail[ed] to offer an intelligible basis for their claim that the [special master-defense counsel] relationship tainted the district court's judgment" (App. 16). In doing so, the court below expressly recognized and applied the principles enunciated in the federal cases now cited by petitioners.

The Petition should be denied.

ARGUMENT

I.

THE COURT BELOW FOLLOWED A UNANIMOUS LINE OF PRECEDENTS REJECTING ANTITRUST ATTACKS ON VERTICAL INTEGRATION BY NEWSPAPER PUBLISHERS

Newspapers in this country (including The Times) derive most of their revenues from advertising, rather than from circulation, and depend on advertising for their survival. Since advertising revenues depend in turn on circulation volume, newspapers have a critical interest in maintaining attractively low home delivery prices in order to maximize circulation.[7] Independent newspaper distributors generally do not share this interest; on the contrary, their primary concern is in maximizing their subscription revenues even if they come from fewer readers.[8]

Accordingly, in recent years many publishers throughout the country have established systems to sell their newspapers directly to subscribers at uniform standards of service and low prices. Unlike The Times, which was relatively late in its vertical integration and merely established supplemental delivery routes to reverse declining home delivery sales, many of these publishers terminated sales through independent distributors entirely.

These changes prompted various antitrust challenges by disgruntled independent distributors, and more than a dozen

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7 These facts are well recognized. *See Paschall* v. *Kansas City Star Co.*, 727 F.2d 692, 701 (8th Cir.), *cert. denied*, 469 U.S. 872 (1984); *Auburn News Co.* v. *Providence Journal Co.*, 659 F.2d 273, 278 (1st Cir. 1981), *cert. denied*, 455 U.S. 921 (1982); *Knutson* v. *Daily Review, Inc.*, 383 F. Supp. 1346, 1362-63 (N.D. Cal. 1974), *aff'd in part*, 548 F.2d 795 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977).

8 *See Newberry* v. *Washington Post Co.*, 438 F. Supp. 470, 477-78 (D.D.C. 1977), and cases cited in note 7, *supra*. *See generally* Areeda, *Antitrust Law* ¶ 729.7a, at 196-98 (Supp. 1982).

federal court decisions unanimously concluded that forward integration in the newspaper industry does not violate the antitrust laws.[9] As the Court of Appeals for the Eighth Circuit stated *en banc* in 1984: "[W]e find it hard to ignore the fact that every other antitrust case brought against a newspaper publisher challenging the newspaper's decision to forwardly integrate into distribution has been resolved in favor of the newspaper." *Paschall* v. *Kansas City Star*, *supra*, 727 F.2d at 704. All of these holdings are consistent with the general principle that vertical integration, even by a monopolist, does not, without more, offend the Sherman Act. *E.g.*, *id.* at 698; *White* v. *Hearst Corp.*, 669 F.2d at 19.

Given the "uncontroverted evidence" that the T-Route system actually created competition in the home delivery market, and petitioners' failure to demonstrate that the intended or actual effects of the T-Route system were in any way anticompetitive (App. 13), the application below of established principles of law to the record in this case was clearly correct. Petitioners' arguments to the contrary are based on a reiteration of factual allegations which both courts below found either without merit or insufficient to raise a genuine issue for trial. The Petition's demand for a judicial reevaluation of the evidence here is equally non-meritorious.

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9 *E.g.*, *Northwest Publications, Inc.* v. *Crumb*, 752 F.2d 473 (9th Cir. 1985); *Paschall* v. *Kansas City Star Co.*, *supra*; *White* v. *Hearst Corp.*, 669 F.2d 14 (1st Cir. 1982); *Auburn News Co.* v. *Providence Journal Co.*, *supra*; *Knutson* v. *Daily Review Inc.*, *supra*; *Bowen* v. *New York News, Inc.*, 522 F.2d 1242 (2d Cir. 1975), *cert. denied*, 425 U.S. 936 (1976); *Norridge News Agency, Inc.* v. *Chicago Tribune Co.*, 1983-2 CCH Trade Cas. ¶ 65,672 (N.D. Ill. 1983); *Ampar Enterprises, Inc.* v. *Reno Newspapers, Inc.*, 8 Media L. Rep. 1670, 1671 (D. Nev. 1982); *McDaniel* v. *Greensboro News Co.*, 1984-1 CCH Trade Cas. ¶ 65,792 (M.D.N.C. 1983); *Grill* v. *Reno Newspapers, Inc.*, 6 Media L. Rep. 1818 (D. Nev. 1980); *Neugebauer* v. *A.S. Abell Co.*, 474 F. Supp. 1053 (D. Md. 1979); *Newberry* v. *Washington Post Co.*, *supra*; *Hardin* v. *Houston Chronicle Publishing Co.*, 434 F. Supp. 54 (S.D. Tex. 1977), *aff'd per curiam*, 572 F.2d 1106 (5th Cir. 1978); *McGuire* v. *Times Mirror Co.*, 405 F. Supp. 57 (C.D. Cal. 1975); *Lamarca* v. *Miami Herald Publishing Co.*, 395 F. Supp. 324 (S.D. Fla.), *aff'd mem.*, 524 F.2d 1230 (5th Cir. 1975).

In the absence of any conflict among the circuits or indeed with any prior decision in the newspaper industry, petitioners flatly contradict the finding below that T-Routes "*created* competition in the home delivery market" in order to set up their argument that the result below is inconsistent with the prior decision of this Court in *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, *supra*.

Despite petitioners' tortured attempts to squeeze this case into the mold of *Aspen Skiing*, in fact the two cases bear no resemblance. *Aspen Skiing* dealt not with a supplier's decision to supplement retail sales of its own product, but rather with the termination of a long-standing joint marketing arrangement between horizontal competitors in order to eliminate all competition. The *Aspen Skiing* defendant had a conceded monopoly in the relevant market, 472 U.S. at 608; both courts here, in contrast, found petitioners' monopoly allegations to be implausible, unsupported by the evidence, and belied by The Times' uncontroverted showing to the contrary (App. 6-8, 22-26). In *Aspen Skiing*, the defendant failed to offer "any efficiency justification whatever" for terminating its arrangement with plaintiff, 472 U.S. at 608; here, as the district court noted, "The Times has presented unchallenged, legitimate business reasons for the modification of its distribution system and the expansion of its home delivery routes" (App. 27).[10]

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10 Petitioners argued below, without proof, that the reversal of declining circulation did not justify the supposedly exorbitant cost of T-Route operations, so that The Times' true motive must have been the elimination of other publishers by means of destroying independent dealers through predatory pricing. Among other infirmities, this speculation ignored the undisputed facts that newspaper publishing is a unitary business in which revenues are derived almost exclusively from the sale of advertising, and that, like other newspapers, The Times is profitable when (and only when) advertising revenues are considered (JA 1972, 2937). There can be no valid claim of predatory pricing here, since there are neither losses nor any expectation of recovering losses in the form of later monopoly profits. *See Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 588-89 (1986).

In *Aspen Skiing*, moreover, defendant's decision was for the sole purpose of eliminating its only competitor. 472 U.S. at 608. Here, in contrast, the lower courts both recognized that the introduction of T-Routes actually created competition in a home delivery market previously monopolized by high-priced independent distributors such as petitioners (App. 13, 24). Both courts also noted petitioners' failure to rebut The Times' showing (a) that T-Route carriers were free to handle competing publications, and (b) that many local publishers had already demonstrated their ability in institute direct delivery networks (App. 7-8, 30).

As the parties in *Aspen Skiing* did not have a supplier-distributor relationship, this Court had no occasion to discuss (much less alter) the rule that even the elimination of an intrabrand competitor does not render vertical integration unlawful. *E.g.*, *United States* v. *Columbia Steel Co.*, 334 U.S. 495, 525-26 (1948); *United States* v. *Paramount Pictures Inc.*, 334 U.S. 131, 173-74 (1948). The court of appeals correctly applied this established principle to the undisputed facts here.

II.

THE PETITIONERS' CLAIM THAT THE JUDGMENT BELOW MUST BE VACATED IS UNWORTHY OF REVIEW

The petitioners delayed over two years before complaining of the special master's previously disclosed contacts with defense counsel in their third ("appearance of partiality") attempt to unseat the special master. By the time of their fourth attempt, the special master had long since ceased to function on any contested matter for several months, and petitioners' motion was correctly denied as moot.

In affirming the trial court and rejecting petitioners' demand for vacatur of its summary judgment order, the court of appeals concluded (a) that the special master's relationship (or alleged relationship) with respondent's counsel did not rise to a

level requiring disqualification or vacatur and (b) in any event, there was no basis for petitioners' claim that the relationship somehow affected the district court's grant of summary judgment (App. 16-17).

Far from disregarding established principles as to the requirements for disqualification, the court of appeals amply supported its decision with precedents and expressly distinguished the circumstances here from those in other disqualification cases, some of which are now cited by petitioners. (*See id.*) The test elicited by the court from these cases, and which it correctly applied here, is " 'whether an objective, disinterested observer, fully informed of the facts on which recusal was sought, would entertain a significant doubt that justice would be done in the case' " (App. 16, quoting from *Pepsico, Inc.* v. *McMillen*, 764 F.2d 458, 460 (7th Cir. 1985)).

Petitioners' real quarrel is obviously not with the legal principles which the court below applied (indeed, they cite the *Pepsico* case with approval, Pet'n 16), but rather with their application to the facts in this case, which are not now subject to reargument. As the courts below recognized, Mr. Wallace had no personal interest in any party or in the outcome of this case; all material aspects of his relationship with Cahill Gordon were known to petitioners when they consented to his appointment as special master; Mr. Wallace's recommendations as special master were subject to *de novo* review by Judge Zampano, and they had ceased well before argument and submission of respondent's summary judgment motion; moreover, Judge Zampano's opinion on that motion did not rely on any factual findings or legal conclusions made by Mr. Wallace (App. 15-17, JA 1496-97, 1632).

These facts stand in sharp contrast to the circumstances underlying the disqualification rulings invoked by petitioners, which turned on the judicial officer's personal interest in the outcome of a matter over which he presided, or his current, significant and undisclosed business affiliation with one of the parties or their counsel, together with his status as final arbiter

of the issues in a case, without the availability of *de novo* review.

Commonwealth Coatings Corp. v. *Continental Casualty Co.*, 393 U.S. 145 (1968), on which petitioners place heavy reliance, is distinguishable from this case on all of these bases. The disqualified arbitrator in that case had been working as a consultant for defendant over a four- or five-year period, including on the very project that was the subject of the arbitration, and the fact of this relationship was not disclosed at all until the conclusion of the arbitration. In ruling that Section 10 of the United States Arbitration Act mandated vacation of the arbitration award, this Court emphasized that the powers of an arbitrator are greater than that of a judge, since the former was given "free rein" to decide questions of law and fact, unconstrained by a substantive appellate review. 393 U.S. at 149. The facts in the other cases cited by petitioners are similarly remote from those here.[11]

In short, the court of appeals' recognition that the facts in this case "did not rise to the level requiring disqualification" can hardly be deemed a conflict among circuits, as petitioners claim in their attempt to relitigate the facts here.

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11 In *Pepsico Inc.* v. *McMillen*, 764 F.2d 458 (7th Cir. 1985), for instance, the court disqualified a judge who appeared to be seeking full-time employment with one of the firms involved in a pending case. In *Hall* v. *Small Business Administration*, 695 F.2d 175 (5th Cir. 1983), the disqualified magistrate's law clerk had continued to work on a class action even though she was a member of the plaintiff class (with expressed convictions about the merits of plaintiffs' position), and had accepted permanent employment with the firm representing the class. And in *Potashnick* v. *Port City Construction Co.*, 609 F.2d 1101 (5th Cir.), *cert. denied*, 449 U.S. 820 (1980), the judge was disqualified for failing to disclose that the lawyer trying the case was his personal counsel in other matters and was currently involved with him in several real estate investments. *See also Texaco, Inc.* v. *Chandler*, 354 F.2d 655 (10th Cir. 1965), *cert. denied*, 383 U.S. 936 (1966) (judge disqualified when it became known that counsel for plaintiff was representing him in an unrelated civil action); *United States* v. *Nobel*, 696 F.2d 231 (3d Cir. 1982), *cert. denied*, 462 U.S. 1118 (1983) (judge disqualified from presiding over criminal trial because he owned a "substantial interest" in the corporate victim of the alleged crime).

Petitioners also argue that the summary judgment ruling must be vacated, not because of any actual or suspected influence by the special master, but because "it is impossible to know what effect [the special master's] influence had on the District Court's decision".[12] The decision itself demonstrates there was no such effect, and the cases petitioners cite for this extreme proposition are inapposite, at best. In *Aetna Life Insurance* v. *Lavoie*, 475 U.S. 813, 824 (1986), this Court required vacation because a Justice of the Alabama Supreme Court had a " 'direct, personal, substantial, [and] pecuniary' " interest in an appeal in which he wrote the opinion and cast the deciding vote. The Justice was pursuing a lawsuit against one of the parties which involved all of the issues decided in his opinion; moreover, his opinion went well beyond established law and broke new ground on issues relevant to his own lawsuit. In essence, his opinion "had the clear and immediate effect of enhancing both the legal status and the settlement value of his own case". 475 U.S. at 824. Needless to say, these facts are far removed from any even alleged in the instant case.

Petitioners' conclusory attempt to distinguish *Ransom* v. *S & S Food Center Inc.*, 700 F.2d 670 (11th Cir. 1983), is likewise unpersuasive. That case cleary illustrates that vacatur would be inappropriate, even if the special master were disqualified, because Judge Zampano conducted a detailed, independent review of the record before granting summary judgment. The defendants in *Ransom* moved to vacate all prior rulings after the district judge had voluntarily recused himself because his father's law firm represented one of the parties. In affirming the denial of this motion (which it characterized as "frivolous"), the court held that the successor judge's adoption of all previous orders stood as an independent ruling because it was based on his own review of the totality of the evidence.

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12 Notably absent from Petitioners' presentation is a single reference to any submission or act by the special master that allegedly influenced Judge Zampano's summary judgment opinion. Instead, Petitioners speculate, with no record support, that the special master may have had "*ex parte* contacts with the District Court concerning issues of fact and law" (Pet'n 19).

In this case Judge Zampano painstakingly reviewed petitioners' eight-volume opposition to the summary judgment motion and issued a well-reasoned, abundantly-supported decision which did not rely in any respect on proposed findings of fact or conclusions of law supplied by the special master. Judge Zampano himself confirmed that the special master played no role in the determination of the motion (JA 1632), and the court of appeals agreed (App. 17). Under these circumstances, even assuming that petitioners had made out a valid case for the special master's disqualification (which they did not), they could not, as the court of appeals noted, "offer an intelligible basis for their claim" that the district court's judgment was tainted (*id.*).

In sum, for all of the reasons cited by the courts below, there was no basis here for disqualification of the special master, and even if there had been, vacatur would have been improper since he had nothing to do with the summary judgment decision. Accordingly, this case is unworthy of review by this Court.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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January 28, 1988

RULE 28.1 CERTIFICATE

Respondent The New York Times Company respectfully advises the Court pursuant to Rule 28.1 of the Rules of this Court that it has no parent company and that it has no subsidiaries or affiliates other than wholly-owned subsidiaries.

Callcenter Services, Incorporated ("CSI"), formerly known and sued herein as MCI Corporation, respectfully advises the Court that it has no parent company and that it has no subsidiaries or affiliates.

No. 87-1118

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ROSEMARY BELFIORE, d/b/a NUTMEG NEWS, MURRAY BERMAN, d/b/a BERMAN NEWS SERVICE and MURRAY'S NEWS SERVICE, BROOKWOOD SERVICES CORPORATION, GREENACRES COM NEWS LTD., GROVE NEWS SERVICE, INC., ZIGMUNT POPLASKI, d/b/a Z & J NEWS SERVICE, RICHARD RITTER, d/b/a GREENFIELD HILLS NEWS SERVICE, and ERIC SCOTT, d/b/a NEW CANAAN/SCOTTY'S NEWS SERVICE,

Petitioners,

—v.—

THE NEW YORK TIMES COMPANY and MCI CORPORATION,

Respondents.

REPLY PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

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Petitioners,

THE NEW YORK TIMES COMPANY and MCI CORPORATION,

Respondents.

REPLY PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ADDITIONAL FACTS AND ARGUMENT

This reply brief in support of the petition for writ of certiorari is submitted to respond to two issues raised in respondents' brief in opposition. First, defendants claim that, before Kenneth Wallace was appointed special master, plaintiffs were informed off the record of all the material connections between Mr.

Wallace and defense counsel Cahill Gordon & Reindel ("Cahill Gordon") and in particular were informed of his ongoing employment by Cahill Gordon as local counsel in the "*M & R*" case. This contention is false. The timing of the information received by plaintiffs is fully discussed below. Second, defendants argue that plaintiffs enjoyed "mini-monopolies" which were themselves anticompetitive. This reply brief identifies the practical reasons and legal authority for having exclusive territories in the home delivery business.

I. *Undisclosed Interests of the Special Master*

Prior to Mr. Wallace's appointment as special master, plaintiffs knew only that Mr. Wallace had been an associate of Cahill Gordon following his graduation from law school (JA 1438-53, 1553-58). Contrary to defendants' assertions otherwise, plaintiffs were not informed – either formally or informally – of any other connection between Mr. Wallace and Cahill Gordon. Plaintiffs agreed to Mr. Wallace's appointment because they believed that his association with Cahill Gordon was short – comprising no more than 6 or 7 years – and that this association was concluded more than 30 years prior to his appointment as special master (JA1622-24[1]).

Plaintiffs first began to acquire information about Mr. Wallace on May 16, 1984, nearly a year and a half after his appointment. At that time Mr. Wallace informed plaintiffs' counsel that prior to going into private practice he had been general counsel to a client of Cahill Gordon, Bigelow-Sanford (JA1559-60). On October 10, 1984, upon examining a *Who's Who in America* (43rd Ed.) entry for Mr. Wallace, plaintiffs' counsel discovered that, rather than just a few years as they had believed, Mr. Wallace had been associated with Cahill Gordon for 14 years (JA1439).

Soon after learning of Mr. Wallace's extended association, plaintiffs moved on November 14, 1984 for formal disclosure by Mr. Wallace (JA1337, 1343). On November 27, 1984, in papers

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[1] "JA" refers to the Joint Appendix in the Court of Appeals.

submitted in opposition to plaintiffs' motion for disclosure, plaintiffs' counsel was first informed that at the time of his appointment Mr. Wallace was local counsel for Cahill Gordon in a case (later identified as the *M & R* case) (JA1353, 1451). The District Court denied plaintiffs' motion without prejudice to renewal and, to the extent that the motion could be construed as one to disqualify the special master, the application was denied as moot because the District Court expressed its intention to conduct pretrial proceedings without the assistance of the special master (JA1100-02, 1129-30).

On December 17, 1984, plaintiffs moved for an order vacating the appointment of the special master and for recusal of the District Court on the grounds that (1) Mr. Wallace failed to disclose his relationship with Cahill Gordon, (2) despite the District Court's intentions' otherwise Mr. Wallace was continuing to participate in the case (as evidenced by his bills for more than 56 hours of work at a time when he was not supposed to be involved) and (3) Mr. Wallace had had *ex parte* contacts with the District Court concerning the case (JA1355-59). The motion was denied by the District Court on December 18, 1984 (JA1136-37).

In December 1985, Mr. Wallace petitioned the District Court for payment of his outstanding fees withheld by plaintiffs pending disclosure by Mr. Wallace (JA1406). During a hearing on Mr. Wallace's petition on January 22, 1986, Mr. Wallace for the first time identified by name the *M & R* case (JA1478).

Also during the January 22, 1986 hearing, Charles Platto, a partner from Cahill Gordon, claimed that before Mr. Wallace's appointment as special master, Mr. Platto had advised Richard Rindler (a partner from plaintiffs' counsel Pepper Hamilton & Scheetz) that Mr. Wallace was acting as local counsel for Cahill Gordon in the *M & R* case (JA1475-76). Mr. Rindler was not present at the January 22 hearing. Although all other attorneys present for plaintiffs denied knowledge of Mr. Wallace's service as local counsel at the time of the appointment, the District Court relied on Mr. Platto's extemporaneous statement and ordered plaintiffs to pay Mr. Wallace's fees (JA1495-97).

After the January 22 hearing, Mr. Rindler denied having been informed by Mr. Platto or anyone else of Mr. Wallace's service in the *M & R* case and denied defense counsel's additional contention that the subject had been raised in an unrecorded conference with the District Court prior to Mr. Wallace's appointment (*see* JA1441-46, 1553-56, 1619-24). Since, in performance of his duties as special master, Mr. Wallace had contacted the parties in late January 1986 for a conference concerning the summary judgment motion, plaintiffs moved on February 27, 1986 for disclosure by and disqualification of Mr. Wallace (JA1561). This motion was denied as "moot" on December 23, 1986 after the District Court granted defendants' motion for summary judgment (JA1632).

Defendants' brief in opposition is inaccurate in claiming unequivocally that plaintiffs were informed of all material facts at the time of Mr. Wallace's appointment. At the very least there was a heated dispute over this issue on the record, particularly with regard to Mr. Wallace's involvement in the *M & R* case (*see, e.g.*, JA1615-31). Defendants use their unequivocal statement regarding these events to mischaracterize plaintiffs' argument as one merely concerning the technical requirement of record disclosure under 28 U.S.C. §455(e). Plaintiffs' claim has always been that Mr. Wallace did not merely fail to make record disclosure, but that he failed to make any disclosure whatsoever.

Defendants do not deny that until 1986 no disclosure of any kind was made of Mr. Wallace's employment by Cahill Gordon in the *Caspray* case in 1983, approximately 8 months after his appointment as special Master. The contention that defense attorneys were unaware at the time that their partners had hired Mr. Wallace for *Caspray* is irrelevant because Mr. Wallace, who surely was aware of the potential conflict, failed to make any disclosure.

While this Court is not in a position to resolve the factual dispute raised by defendants' contentions that they made informal disclosure, the mere existence of the factual dispute illustrates the importance of the statutory requirements of record disclosure, *see* 28 U.S.C. §455(e), and makes this case worthy of

review by this Court. Even if this Court should determine that record disclosure need not have been made, this case presents the important ethical issue of whether such a factual dispute should have gone unaddressed by the District Court.

II. *Exclusive Territories*

The cooperative distribution system established decades ago by a New York publishers' association created exclusive territories for sound business and pro-competitive reasons. By giving only one dealer the task of delivering all newspapers to a given neighborhood, optimal efficiency was achieved – each publisher benefitted from the savings gained by including the circulation of all other publishers' newspapers in calculating the per paper cost of delivery (JA1705-09, 1775, 2174-75, 2889-91). By reducing the cost of home delivery, publishers were free to compete based on the quality, editorial content and price of their newspapers.

The pro-competitive value of exclusive territories in the home delivery of newspapers was recognized in *Albrecht v. Herald Co.*, 390 U.S. 145, 152-153 (1968), where this Court protected an independent routedealer with an exclusive territory from price fixing by the publisher. After warning the dealer that his prices were too high, the publisher had arranged price competition with the dealer from an outside source. The Court upheld the dealer's market prices reasoning that "[m]aximum prices may be fixed too low for the dealer to furnish services essential to the value which goods have for the consumer or to furnish services and conveniences which consumers desire and for which they are willing to pay." *Id.* The publisher was held liable for price fixing. *Id.* at 154.

Similarly, in *Newberry v. Washington Post Co.*, the court found that a vertical allocation of exclusive newspaper delivery territories was not only legal but that it furthered "a legitimate marketing objective: to accomplish maximum market penetration and prompt, efficient, undisrupted delivery to home subscribers. Given the 'facts peculiar to the [newspaper] business,'

the system adopted was reasonably necessary to achieve this objective." 438 F.Supp. 470, 475, 476 n.8 (D.D.C. 1977) (citing *Albrecht v. Herald* and *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977)).

Thus the mere fact that plaintiffs operate in exclusive territories does not undermine their antitrust claims and does not alter the appropriateness of this case for review of the guidelines set forth in this Court's recent summary judgment decisions.

CONCLUSION

While plaintiffs deny that they were in any manner informed of the material connections between the special master and defense counsel, defendants' contentions that plaintiffs were informed off the record creates a factual issue which highlights the importance of requiring record disclosure or resolution of the factual dispute. The absence of either by the District Court and Court of Appeals creates a decision which flies in the face of all prior precedent, which will adversely affect the federal judicial system, and which therefore warrants a grant of certiorari in this case.

Certiorari should also be granted because the existence of exclusive territories does not change the appropriateness of this case for illustration of the guidelines set forth in this Court's recent summary judgment decisions.

Respectfully Submitted,

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